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which any private malefactor would have to pay. n62

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n61 Of the eminent domain power, such as to acquire land for a road, Blackstone asked rhetorically:

In this, and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.

William M. Blackstone, 1 Commentaries *135 (emphasis added).

n62 I have skirted here the question of whether the government should have to pay for the destruction of goodwill when it does not take property. In my view the answer is yes. If a store serves a neighborhood, and the government tears up the neighborhood so that the store remains, but without customers to frequent it, the store has lost goodwill, here because the government has forcibly interfered with an advantageous business relationship. The state should be required to include this loss of goodwill in working its own calculus of condemnation. To ignore it would allow the government to externalize systematic harms, which in turn would allow the government to condemn too much private land.

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B. Question Two: The Violation of the Right

The second part of the problem concerns not the constitutional rights that are protected, but the types of government actions that they are protected from. Although there are countless different schemes of government action, they can best be understood as variations on a few pure types of government action. The most obvious is dispossession -- the direct takeover and operation of private activities; others are modifications of liability rules, regulation, and taxation. The following sections compare how the courts have treated each of these four types of government actions when they affect property, and when they affect speech.

1. Dispossession.

Within the area of property, there is a sharp disjunction between how the courts treat government dispossession and all other forms of government action. Those cases where the government takes "permanent physical possession" n63 of property are regarded as per se takings, and the government is required to compensate the property-owner for the taking. But with only small qualifications related to when the government compromises the property-owner's [*64] "right to exclude," n64 these constitute the only class of per se takings, for which compensation is required.

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n63 Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 426 (1982).

n64 Loretto relied heavily on Kaiser Aetna v United States, 444 US 164, 179-80 (1979), in which the Supreme Court found a taking where the government had demanded public access to a private marina. The case was not one of dispossession, for the state did not seek to exclude the private owner from the use of the marina. But the state did compromise the right to exclude, which the Court found a fundamental stick in the bundle of property rights. To a property lawyer, the case is too easy to require extended comment. There is a taking whenever A requires B, a sole owner, to become a joint tenant with A against B's will. Otherwise A could force the joint tenancy, then partition, and through two steps take half of what B owns. Do it enough times and we have a new cottage industry of dubious worth.

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Within the area of speech, stronger protections apply. The government cannot take permanent physical possession of the New York Times printing presses, even if the government is prepared to pay compensation. The protection afforded speech against dispossession thus goes beyond that afforded property, but for reasons that are consistent with the basic logic of the Takings Clause. The reason why some takings of private property are allowed, with just compensation, is that the forcible rearrangement of property rights is understood to provide some net social benefit. But where is the net benefit when speech is suppressed? The interest in speech is typically relational -- communication is of benefit to the audience as well as to the speaker -- and no compensation formula easily takes that interest into account. If the government needs a printing press, it knows where to buy it; so too with raw land. On the other hand, there is the real risk that the government will condemn newspapers simply to suppress criticism. In short, prohibiting this limited class of prospective condemnations prevents hardly any socially beneficial transactions, while permitting them raises the persistent specter of government abuse. Thus the government takeover is flatly forbidden under the First Amendment.

2. Modification of liability rules.

The Court has held on a number of occasions, even before 1937, n65 that no person has any vested right in any common law rule of liability. But there has been a long line of Supreme Court cases in which the very forms of liability rules that provoke only yawns under the Takings Clause have received close attention under the Free Speech Clause. For instance, under the First Amendment, the rules of tort liability are regarded as essential subjects for mischief and abuse, and hence are given close constitutional scrutiny. The results can lead to the fortification of some common law rules of [*65] liability, but to the repudiation of others. Thus, in New York Times v Sullivan, n66 the Court refused to show any deference to the settled common law of defamation; instead, all of its substantive dimensions were subject to constitutional review, and in some instances revision. Thus the state cannot expand the definition of the identification requirement ("of and concerning the plaintiff") beyond the scope that it had at common law. More dramatically, the courts have found that certain critical features of common law protections for defendants have been inadequate. The strict scrutiny of liability rules, moreover, is not only directed at issues that are tangential to the overall soundness of the system, but is directed to issues that go to its heart: awarding general damages; n67 putting the burden of proof on the defendant to show truth; n68 and, most importantly, extending the privilege of "fair comment" to cover not only statements of opinion, but also false statements of fact,

unless the media defendant knows them to be false or acts in reckless disregard of their truth or falsity. n69

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n65 See, for example, New York Central R.R. Co. v White, 243 US 188, 198-200 (1917).

n66 376 US 254 (1964).

n67 See, for example, Gertz v Robert Welch, Inc., 418 US 323, 348-50 (1974) (no recovery for presumed or punitive damages).

n68 Philadelphia Newspapers Inc. v Hepps, 475 US 767, 776-78 (1986) (private-figure plaintiff in defamation action bears burden of showing that alleged defamatory speech is false).

n69 New York Times, 376 US at 279-80. For my defense of the common law baseline in this connection, see Epstein, 53 U Chi L Rev 782 (cited in note 9).

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All these innovations should not be viewed in the same light. In some instances the Supreme Court reads the First Amendment in a sound fashion -- to maintain requirements of proof that are demanded by a consistent theory of individual freedom. Placing the burden of proof on a plaintiff to prove that certain facts are false is one such innovation. But, in other instances, as with giving extensive protection to false statements of fact, the Supreme Court goes far beyond that modest office, and quickly gets itself into trouble. The major criticism of the modern law of defamation is that it affords no effective redress for public officials and public figures who have been victimized by false statements. Media defendants are allowed to shield themselves from the harmful consequences of their acts, merely by admitting that they were negligent. n70 Finally, in some cases, like the doctrine of presumed damages, the balance of equities is sufficiently close that one wonders why the court finds it [*66] imperative to upset a balance of interests that seems to have worked well over time, absent an evidence of systematic abuse or untoward social consequences.

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n70 See, for example, Randall P. Bezanson, Gilbert Cranberg, and John Soloski, Libel Law and the Press: Myth and Reality 214-18 (Free Press, 1987) (criticizing focus of defamation law on defendant's mental state and advocating separate procedures that allow adjudication of question of truth even where plaintiff cannot establish actual malice).

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There are many errors of detail in First Amendment defamation law, virtually all of which stem from its deviation from superior common law principles. But the mistakes in application do not deny the bedrock proposition of New York Times: there should be constitutional scrutiny of the law of libel. That scrutiny of liability rules should carry over to the Fifth Amendment. As a matter of general theory, there are not two watertight compartments: one for

property rights, protected by the Constitution; the other for liability rules, subject to legislative discretion and control.

To test the proposition by the extreme case, it seems clear that the total repeal of the law of trespass would constitute a complete revolution in the basic civil order. If individuals are not allowed to exclude deliberate trespassers from their ranks, then we have retreated from a system of ordered government to a system of state-sanctioned anarchy. The right to exclude under the rubric of private property has been protected in some cases. n71 But in many others, such as when factory owners seek to exclude union organizers from their land, the Supreme Court has looked upon the suspension of the common law rules of trespass not with doubt and suspicion, but with relief and welcome. n72 Similarly, in the entire area of environmental regulations, it is clear that any appeal to ideas of trespass, or nuisance, or the right to exclude carries little weight in the present constitutional order. n73

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n71 See Kaiser Aetna, 444 US at 179-80.

n72 See Republic Aviation Corp. v NLRB, 324 US 793, 802-05 (1945); Beth Israel Hospital v NLRB, 437 US 483, 491-93 (1978). There are, of course, complications in this area, given that outside organizers may well be regarded as trespassers, even though present employees whom the employer wants to exclude are not. See NLRB v Babcock & Wilcox Co., 351 US 105, 112 (1956); Lechmere, Inc. v NLRB, 112 S Ct 841 (1992). But now the judicial vice is to mangle the common law of trespass, instead of just disregarding it. The traditional view was clear that entry was limited to the time of its allowance, and to the purposes for which it was granted. See The Six Carpenters' Case, 77 Eng Rep 695, 8 Co Rep 146 (1610).

n73 See, for example, Miller v Schoene, 276 US 272, 280 (1928) (state act providing for the destruction of red cedar trees located within two miles of apple trees found to be constitutional, even though no compensation was given for value of standing trees or decrease in value of realty).

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To hold, as I argue, that legislative modifications of liability rules fall under the Takings Clause would not preclude the state from justifying its modification by appealing to the overall welfare of the community. In fact, it would facilitate a rigorous demonstration of that defense in those cases where it can be mounted. But [*67] the converse -- exclusion from constitutional scrutiny of most modifications of liability rules -- can lead to the radical destabilization of the system of property rights, with (as I shall show later) long-term adverse consequences for the political and social system.

3. Regulation.

Liability rules are only one way in which the government, particularly the activist government, has altered the distribution of property holdings among the citizenry. The government has achieved the same result by imposing various schemes of regulation, such as those which were sanctioned in the early rent control and zoning cases. And the property-owner must overcome a very heavy set of burdens to obtain compensation from the state. Indeed, the Supreme Court

has positively gloried in its inability to articulate clear rules to govern this area: the Court has pretended to decide each alleged regulatory taking on an ad hoc basis. n74 In fact, however, the Court has adopted a rule that is predictable, but incorrect: a virtually conclusive presumption against requiring compensation for any regulation.

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n74 See, for example, Penn Central Transportation Co. v. New York City, 438 US 104, 124 (1978).

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In contrast, regulation is an abridgment of speech under the First Amendment in a way that it is most definitely not a taking (even a partial taking) of property under the Fifth Amendment. Where regulations of speech are imposed, the Supreme Court has an elaborate classification system designed to cull out unacceptable forms of regulation. There are divisions into high and low value speech, and into content-based and content-neutral regulations, each with its own pattern of justification. n75 But there is not the slightest suggestion anywhere in the entire body of First Amendment law that "mere" regulation of speech is outside the scope of the First Amendment. The clear perception is that the unrestrained state can stifle speech and dissent through regulation just as easily as through a direct ban. Bond or permit requirements for speakers are always closely scrutinized to see if they conceal an illegitimate effort to restrict the scope of speech generally. n76 Special scrutiny is imposed where there is the slightest hint that the restrictions are linked to the speaker's viewpoint, however distasteful [*68] that viewpoint may be to the public at large. n77 The fear of abuse of this regulatory power is the most salient explanation for this aspect of First Amendment law.

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n75 See text accompanying note 29.

n76 See, for example, Cox v New Hampshire, 312 US 569 (1941) (conviction upheld in parade statute prosecution only because state court had held that local licensing officials could only consider time, place, and manner restrictions).

n77 See, for example, Thomas v Collins, 323 US 516, 540 (1944) (invalidating Texas statute that required union organizers to obtain permit).

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Analytically, there is no ground for the distinction between regulatory takings and infringements of free speech. The state has taken the fee simple, even if it returns some portion of the land by way of compensation. Likewise, it has taken the fee simple if it confiscates it, but then returns it subject to new restrictions on use and disposition. Restrictive covenants are property interests when created by consent, and they remain so imposed by the state. What one side -- the covenantee -- obtains, the other side -- the covenantor -- loses. To treat these regulations as "mere" restrictions that fall outside the scope of the Takings Clause is to immunize vast areas of government behavior from judicial scrutiny in a manner that would be incomprehensible under the

First Amendment.

4. Taxation.

The last mode of government attack on private behavior is through a system of taxation. While the formal possibility of mounting a successful takings challenge against taxation is not explicitly denied by the Court, it is well-nigh impossible to find any challenge that has succeeded, even before 1937. n78 As for regulations, the courts have adopted a virtually conclusive presumption against requiring compensation for any tax.

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n78 For a typical statement, see Magnano Co. v Hamilton, 292 US 40, 44 (1934) (Th[e Takings] Clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.").

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Long ago, Justice Marshall's famous aphorism warned that the power to tax was the power to destroy. n79 As government taxes continued to rise even before the end of the Lochner period, Justice Holmes, who had so much to do with the expansion of the government power to tax, was led to say, in essence, "so what?" n80 Judges continue to solemnly maintain that egregious taxes will fall under the Takings Clause, but if the Supreme Court has invalidated a tax on takings grounds in the past seventy-five years, I am not aware [*69] of it. The basic principle is evidently that the mere benefit of living in a civilized society is sufficient justification for the imposition of any tax, however indefensible its incidence or form. n81 The dangers that unsound systems of taxation can work to the operation of the economic system are not factored into the constitutional equation. But to deny that taxes are takings -- when they involve the threat of seizure for those who do not voluntarily hand over property -- is to use a definitional ploy to answer a question that calls for a policy response: Which forms of taxation are permissible in a democratic society, which are out of bounds, and why?

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n79 See McCulloch v Maryland, 17 US 316, 431 (1819).

n80 See Alaska Fish Co. v Smith, 255 US 44, 48 (1921) ("Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.").

n81 See Carmichael v Southern Coal Co., US 495, 522 (1937) ("The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.").

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The attitude toward taxation under the First Amendment is quite different. It is recognized that taxation is yet another form of government control, which, if placed in the wrong hands or directed to the wrong means, can distort the political system. It is clear that the protection of various forms of speech against taxation does not absolutely prohibit taxation: newspapers can be taxed on their business profits like other organizations. But it has led to scrutiny of the permissible justifications for taxation, and of the permissible forms of taxation. n82

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n82 See Section III.E.2.

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In sum, within the law of takings, the broad class of partial takings -- changes in liability rules, regulations, taxation -- are all thought to trigger at most a cursory review, if they are regarded as takings at all. n83 The evasiveness of the mode of analysis is always calculated to impress upon us the need for judicial deference and legislative discretion, and thereby the justification to expand the use of government force. With the regulation of property, the pattern of judicial deference stems from the want of any deep conviction that limitations on government power are beneficial, and from the consequent unwillingness to formulate any principles that have bite. n84

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n83 See, for example, Penn Central, in which Justice Brennan found that New York City's landmark preservation law was not a "taking" of the plaintiff's property. 438 US at 136-38. But Justice Brennan left open the possibility that, if the designation system were a taking, then government would have adequately compensated the plaintiff by awarding it transferable development rights ("TDRs"), even though the TDRs were worth only a tiny fraction of the value of the air rights of which the government had deprived the plaintiff. Id at 137. Yet under the later holding in Kaiser Aetna, 444 US at 180, the case would have been a taking if the government had sought to build on the plaintiff's property itself, instead of taking what is in essence a restrictive covenant on height.

n84 See, for example, Justice Brennan's statement in Penn Central: While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Armstrong v United States, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. 438 US at 123-24. It is easy to fail if you do not try.

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[*70]

There is no similar relaxed or deferential attitude within the law of speech. Commentators who care about the principle always warn that "[a] system of freedom of expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for

exceptions. And any such exceptions must be clear-cut, precise, and readily controlled." n85 All attacks on private speech are regarded as potentially deadly threats to the operation of the marketplace of ideas, or to full and active participation in the political process. The Court never takes the view so common in property cases that the "wisdom" of the legislation bears no relationship to its constitutionality.

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n85 Emerson, The System of Freedom of Expression at 10 (cited in note 24).

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C. Question Three: Justifications for Government Restrictions on Speech and Property

It is clear to limited government libertarians that liberty should not be regarded as equivalent to anarchy, either as a matter of first principle or as a matter of constitutional interpretation. The idea of anarchy is that any person is allowed to speak or do anything that he chooses, and that the sole restraint upon that conduct is private force. Within a legal system, however, the concept of liberty always means what Cardozo once termed "ordered liberty" n86 -- restraints on the freedom of action that take into account the correlative duties that individual actors owe to others. That these duties exist is perfectly apparent in the world of individual actions: the right to own property and to use it as one pleases is not an authorization to kill the first person with whom one has a minor disagreement.

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n86 Palko v Connecticut, 302 US 319, 325 (1937).

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I believe that the system of libertarian justifications is traceable to a powerful set of utilitarian roots. n87 Restrictions on the individual's capacity to act are based on the view that all persons are better off by sacrificing their natural liberty of action than by exercising [*71] it in a world where others use their natural powers against them. The prohibition against the threat of force thus arises from the mutual renunciation of the private use of force, obtained not through voluntary agreement, but by government edict, needed to overcome the holdout and bargaining problems that otherwise would exist. However, for these purposes it is not important to detail the exact derivation of these utilitarian claims, for the restrictions on the use of property and freedom of action are accepted by virtually every one, including those who conceive of a far broader set of public justifications for the restriction of property and/or speech.

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n87 I have developed this idea in Epstein, 12 Hary J L & Pub Pol 713 (cited in note 34).

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What is equally clear under libertarian theory is that there is no artificial divide between speech and property when the question is whether there is any justification for limiting individual actions. Freedom of speech implies the same limitations associated with freedom of action, or with freedom of contract. The same concerns with force and fraud that arise under the general libertarian theory surface with great force in efforts to discover the appropriate limits of both speech and property rights. For instance, the threat of force will often involve the use of speech, and if not speech, then surely those forms of expression (for example, gestures or signs) that fall comfortably within the narrowest definitions of expression championed under modern theory. The mere fact that the threat and the use of force are equated under the general theory shows that both speech and conduct are subject to the same sort of scrutiny, and for much the same reason: to improve the overall operation of the social system.

1. Justifications for restricting free speech.

a) Preventing private force. Many First Amendment cases deal with the government's power to punish conduct that involves the threat or use of force. The entire line of sedition cases, from the outset of the First World War until the 1950s, were largely devoted to a single question: When, and how, could the government impose restrictions upon speech that posed the risk of physical danger or disruption of public services? n88 Holmes put the issue squarely in Schenck when, in conjunction with his reference to shouting "Fire!" in a crowded theater, he noted that "[the most stringent protection of free speech] does not protect a man from an [*72] injunction against uttering words that may have all the effect of force." n89 A similar view was taken where "fighting words" threatened riot or mayhem. n90

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n88 For a collection of the relevant cases and materials, see Stone, et al, Constitutional Law at 1025-1100 (cited in note 7).

n89 Schenck, 249 US 47, 52. See also note 28 (discussing Kalven's views).

n90 See, for example, Chaplinsky v New Hampshire, 315 US 568 (1942), in which the Court noted the "fighting words" exception to the First Amendment, and narrowly construed it to cover only those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id at 572. See also Feiner v New York, 340 US 315 (1951), in which the Court similarly limited "fighting words" to those which posed an "immediate threat to public safety, peace or order," and sustained a conviction on those grounds alone. Id at 320, citing Cantwell v Connecticut, 310 US 296, 308 (1940).

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During the formative period of modern First Amendment jurisprudence, the police power of the state was confined to police work. No matter how much we have come to disapprove of Schenck, and to admire Abrams v United States, n91 the exceptions to the basic protection of speech were always associated with the preservation of the public order against the risk of treason or violence. The significant debates over the scope and limitation of the "clear and present danger" test were all about the narrow class of ends that government could permissibly suppress. If the speech in question threatened conduct that was not a common law offense against person, property, or national security, then its

suppression was inconsistent with freedom of speech. There was no discussion about the irrelevance of the common law, or the search for novel baselines congenial to the New Deal era. There was an extensive debate over how far back to roll the carpet in order to protect against the overthrow of the government, an issue on which strong disagreement is possible. n92

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n91 250 US 616 (1919) (knowledge of probable consequences of distributing circulars sufficient to sustain conviction under Espionage Act of 1918).

n92 See Gitlow v New York, 268 US 652 (1925) (requires "language of direct incitement" "used with intent and purpose"); Whitney v California, 274 US 357 (1927) (stressing deference to the legislature, upheld conviction for membership in an organization advocating criminal syndicalism); Dennis v United States, 341 US 494 (1951) ("whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"); Yates v United States, 354 US 298 (1957) ("those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something").

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The current constitutional equilibrium on subversive speech, reached in Brandenburg v Ohio, n93 is consistent with the general libertarian approach:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is [*73] directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in Noto v. United States, 367 U.S. 290, 297-98 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." n94

By the same token, it goes without saying that offensiveness does not limit the scope of First Amendment protection. The flag-burning case is the most salient illustration of political speech, designed to offend, but which nonetheless cannot be regulated because it does not pose an imminent threat of violence. n95

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n93 395 US 444 (1969).

n94 Id at 447-48. Note that one could quarrel with this decision on the ground that it is too protective of speech. There may be some harms so serious in their implications that the imminence requirement should be relaxed. But for these purposes, the rule falls squarely within the libertarian tradition, and tallies closely with Chaplinsky.

n95 See Texas v Johnson, 491 US 397 (1989).

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The reasons for judicial protection are instructive on the theme of distrust. It is not that the harms caused by flag-burning and similar activities are not real, for they are, or that they are not substantial, for that they may be as well. n96 Instead, it is that the risks of collective reprisal are rightly regarded as so great that the government is required to stay its hand. The class of external harms that justify the police power are sharply, even artificially, limited in order to limit the scope of government action. The parallel here is to the common law conception of damnum absque injuria ("harm without legal injury"), which is imposed not because other persons have suffered no harm, but because the freedom of action and the social gains which that freedom brings are only possible when certain forms of harm (for example, offense, competitive loss) are not recognized by the legal system. n97

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n96 "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Johnson, 491 US at 414.

n97 This point was first developed in Oliver Wendell Holmes, Jr., Privilege, Malice, and Intent, 8 Harv L Rev 1, 2-10 (1894).

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The question of external harms does not arise, however, only in subversive advocacy cases, but in other less dramatic contexts as well. Public speech can often be noisy and offensive, and it is clear that the Court tolerates "time, place, and manner" restrictions on speech. n98 Two features about these regulations should be quickly noted. First, they are directed against conduct that the common [*74] law ordinarily treats as nuisance, such as the use of loudspeakers or sound trucks in public places. n99 Second, the problem of selective enforcement looms large even when the regulations are content-neutral, and is taken into account when the courts review the enforcement of these "time, place, and manner" restrictions. These restrictions on speech thus require principled justification as well.

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n98 See Stone, et al, Constitutional Law at 1257-1337 (cited in note 7).

n99 See, for example, Kovacs v Cooper, 336 US 77 (1949).

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b) Preventing private fraud. Other speech restrictions are justified on the grounds that they prevent private fraud or misrepresentation. The libertarian rationale for the tort of defamation is that it constitutes the wrong of misrepresentation, directed not to the victim of the wrong, but to some third party. The New York Times line of cases shows how even misrepresentation cases are greeted with hostility, in large measure because of the suspicion of the abuse of government power. n100 And the same attitude of caution is shown toward state efforts to regulate the conduct, for example, of union organizers, even under circumstances where there is persuasive evidence of private fraud. n101

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n100 For an overview of the New York Times line of cases, see Stone, et al, Constitutional Law at 1145-71 (cited in note 7).

n101 See Thomas v Collins, 323 US 516 (1945) (statute requiring labor organizers to obtain a permit soliciting workers to join unions invalid under the First Amendment.

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Even the commercial speech cases have shown some signs of falling into the same pattern. In principle, these cases show the impossibility of maintaining the strong line between action and expression that drives Emerson's analysis of the First Amendment. A price system is best understood as a system of communication that impounds relevant information. Thus a system of price controls is best understood as an interference with the way in which the price system transfers that information. n102 Direct attacks on price controls based on takings or allied grounds have had only rare success. n103 But while the price mechanism has not been brought under the First Amendment, ordinary forms of advertisement have been, and here the libertarian potential of the First Amendment sometimes surfaces.

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n102 For an elaboration of the point, see Daniel Shapiro, Free Speech, Free Exchange, and Rawlsian Liberalism, 17 Social Theory and Practice 47, 50-57 (1991).

n103 For one recent victory, see Calfarm Insurance Co. v. Deukmejian, 258 Cal Rptr 161, 771 P2d 1247, 1252-56 (1989) (granting relief against automatic 20% rollback in insurance proposal). For one recent failure, see State Farm v State of New Jersey, 124 NJ 31, 590 A2d 191 (1991) (rejecting challenge to New Jersey's insurance reform legislation).

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[*75] Take a case in point. In Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, n104 the Court struck down state restrictions that barred pharmacies from advertising the price at which they sold their goods. The fanciful justifications that were offered for such regulation all had an economic cast: that advertisement would lead to a loss of the professional image among pharmacists; that able firms would be driven out of business because of their inability to compete on price, leaving a clear field to the predators to drive up the price thereafter. n105 Had this been a challenge based on the Due Process Clause, the Court indicated that these rationales, however specious, could have justified the statute. n106 But within the framework of the First Amendment, the Court immediately reverted to the libertarian analysis, and noted that the seller of a high-quality product could advertise quality in opposition to price. n107 It has been said that this decision resurrected substantive due process, n108 and so it did, but that should be regarded as one of its strongest features, not as one of its drawbacks.

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n104 425 US 748 (1976).

n105 Id at 764-70.

n106 Id at 769.

n107 Id at 769-70. The Court did, of course, permit regulation against advertisements that were "false or misleading in any way." Id at 771.

n108 See Thomas H. Jackson and John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va L Rev 1, 29-33 (1979).

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2. Justifications for restrictions on property rights.

In most cases involving property or economic liberties, however, the police power, now used as a term of art, has grown so that it bears no relationship to the control of either force or fraud. Few cases of land use regulation, for example, are concerned with the control and use of force in any form. The nearest kin to trespassory force is nuisance; yet the nuisance control rationale for the police power in land use cases has been repeatedly rejected as an authoritative basis for deciding these cases. n109 Often the nuisance control rationale is rejected on conceptual grounds: that it is impossible to tell who has caused a nuisance and who has been a victim. n110 This is ironic, because the nuisance control rationale is an [*76] important distinguishing principle for content-neutral cases under the First Amendment. On the one hand, content-neutral regulation designed to limit the use of sound trucks is routinely upheld. n111 On the other hand, legislative characterizations of certain other conduct as "nuisances" -- such as the distribution of handbills -- are accorded virtually no weight at all. n112

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n109 The process started in the 1920s with Euclid v Ambler Realty Co., 272 US 365, 387-88 (1926), and Miller v Schoene, 276 US 272, 280 (1928), and continues today.

n110 The view has also been defended in Michelman, 80 Harv L Rev at 1196-1201 (cited in note 6); Joseph L. Sax, Takings and the Police Power, 74 Yale L J 36, 48-50 (1964); Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L J 149, 161-69 (1971). I have criticized the view in Takings at 115-21 (cited in note 2).

n111 See note 99 and accompanying text.

n112 See, for example, Lovell, 303 US 444, 451 (voiding city ordinance which put prior restraint upon distribution of handbills and similar literature as "nuisances").

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The difference in approach yields powerful differences in consequences. Once all specific content has drained out of the police power language, any legitimate public function of conceivable merit justifies government

restriction on land use. The narrow account of external harms accepted under the First Amendment no longer limits what the state may do under the Fifth Amendment. Aesthetics, popular sentiments, and environmental objectives all become appropriate pegs on which to hang legal justifications for land use restrictions. n113 No explanation is given as to why the narrow account of external harms under the First Amendment is so inappropriate here. As the ends have widened, so too the means to achieve those ends have been broadly construed, and all the burdens of proof are set in favor of the state, so that any challenge of land use restrictions is always an uphill battle.

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n113 See, for example, Berman v Parker, 348 US 26, 32-33 (1954) (holding that protection of "spiritual" and "aesthetic" values was a legitimate exercise of municipality's police power).

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Notwithstanding the many differences in the reach of the police power in speech and property cases, there does exist some convergence between them, namely under the shadowy protection of the public "morals" facet of the police power. Here the great problems arise in mixed cases, such as those involving billboards n114 or "adult" movie theaters, n115 where the level of regulation tolerated by the courts is normally higher than that associated with speech alone. In part, the rationale for these decisions is that the regulations deal not only with speech, but also with land use, where the standards of review are clearly much lower. The outcomes are in part defensible, especially if one could demonstrate that certain private activities increase the risk of neighborhood violence and disorganization. In some cases, such as the recent nude dancing decision, n116 problems of land use and free speech converge. The principles [*77] of individual freedom collide with the "morals" facet of the police power, which sometimes operates as a supplement to, and at other times as an extension of, the state's power to prohibit various forms of violence and fraud.

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n114 See Metromedia, Inc. v San Diego, 453 US 490 (1981).

n115 See Young v American Mini Theatres, 427 US 50 (1976).

n116 Barnes v Glen Theatre, 111 S Ct 2456 (1991).

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These difficult cases lie at the edge of the law under any comprehensive theory, and for my purposes, at least, the location of the proper line is not the dominant concern. The so-called "morals" cases represent the easiest extension of the police power in a land use setting, and the most difficult extension of the police power in a First Amendment setting. It is the radically different responses to the easy cases that marks the difference under the two amendments. A more unified approach to the questions of speech and property would aid in the design of a more satisfactory legal response.

D. Question Four: The Choice of Remedies

The differences in judicial treatment of speech and property are also revealed in the selection of remedies against individual actors that have committed some wrong. In principle, there is a wide range of remedies available for any wrong. Some of these remedies are imposed through direct government action, as when the criminal law provides for imprisonment and fines. In addition, there is a full range of administrative and regulatory remedies designed to eliminate the harm before it begins. Injunctions can be issued against threatened harms, and most importantly a system of permits and licenses can be imposed in order to prevent these harms in the first place. Similarly, on the private side, individual plaintiffs may seek orders for damages, orders for restitution, or injunctions. In those cases where there is only a single isolated harm, the choice of remedy is relatively constrained: damages matter, injunctions do not. But with institutional defendants capable of repeat offenses, systems of social control and systems of prior restraints are feasible, and, in some circumstances -- for example, driver's licenses -- desirable as well.

1. Prior restraints on speech.

As with other parts of the overall system, the choice of remedies is driven in large measure by the fear of government abuse, relative to private abuse. In the First Amendment area, there is a virtual per se rule against any prior restraint of publication, no matter how harmful or defamatory the material might be. Historically, a fear of prior restraint was the first great motivating force of [*78] the free speech tradition, dating back to Milton and Blackstone. n117 In its modern form, once a restriction is identified as a prior restraint, any individual citizen is free to act in defiance of that restriction without exhausting any available administrative remedies. n118 There is no possibility that the state can postpone publication of controversial speech by making grudging administrative concessions after intolerable procedural delays.

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n117 John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England, in George H. Sabine, ed, Areopagitica and Of Education (Harlan Davidson, 1951); William M. Blackstone, 4 Commentaries *151 ("The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.") (emphasis in original).

n118 See Lovell, 303 US at 452-53 ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her.").

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There have been a wide variety of concerns with the licensing power, all of which work back to the common theme of distrust. It is said that licensing concentrates too much power in the hands of a small group of individuals, not only when it provides for administrative remedies, but even when it provides for judicial review of individual cases. n119 It is said that the want of clear standards only increases the risk of the improper use of discretion by

political actors. n120 It is said that prior restraint keeps relevant information off the market; thus it denies the audience the right to read and comment on that information itself, and it denies the author the right to publish the material so long as he or she is prepared to pay the price. n121 It is said that the procedural protections from administrative hearings arelikely to be lower than those of judicial proceedings, especially in a criminal context. n122 It is all true.

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n119 Near v Minnesota, 283 US 697, 715 (1931) (Minnesota statute authorizing state to seek injunctions against routine publishers of malicious or defamatory information on the grounds of nuisance found unconstitutional).

n120 City of Lakewood v Plain Dealer Publishing Co., 486 US 750, 769-70 (1988) (ordinance granting mayor absolute discretion in granting of applications for annual permits to place newsracks on public property found unconstitutional).

n121 See Thomas I. Emerson, The Doctrine of Prior Restraint, 20 L & Contemp Probs 648, 656-60 (1955).

n122 Id at 657. See also Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn L Rev 11, 43-47 (1981).

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The upshot is that any form of prior restraint is struck down, even when there is an arguable ground for issuing an injunction under ordinary common law principles, as was the circumstance in the Pentagon Papers case. n123 Prior restraints of all forms and descriptions [*79] are routinely disallowed, save under the most extraordinary circumstances -- such as where I can show you how to make a nuclear bomb cheaply. Other criminal and civil sanctions are required.

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n123 New York Times Co. v United States, 403 US 713 (1971) (lifting temporary injunction against publication of information leaked to papers by Daniel Ellsworth). Among the reasons offered for the decision was that Congress had only authorized criminal sanctions against the individuals who improperly obtained or retained forbidden information, so that the decision dealt as much with separation of powers as with freedom of speech. See id at 740-48 (Marshall concurring). But at common law, a private party could normally obtain relief against a third person who acquired property with knowledge that it was not owned by the immediate seller. In principle, the analogous rule could apply to sales of information. The injunction could then be applied against persons who received stolen information in bad faith, that is, with knowledge that it had been obtained illegally.

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2. Prior restraints on property use.

The situation is radically different under the Takings Clause, where today it is virtually impossible for any private party to maintain a facial challenge against any form of land use regulation. Instead, the dominant rule requires that all administrative remedies first be exhausted, and that constitutional challenges be brought on an "as applied" basis. n124 The risk of government misbehavior due to local or national politics is as large here as it is with speech restrictions: there are dangers of excessive local power and bias; there are costs to outsiders (the potential buyers of the developed property) which are ignored in setting the social calculus; there is far less protection than in any judicial proceeding. There is no reason to believe that public officials who improperly thwart the distribution of leaflets will become impartial solons on economic matters. No one has that kind of a split brain, with virtue in the property hemisphere, and vice in the speech hemisphere.

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n124 Hodel v Virginia Surface Mining & Reclamation Ass'n, Inc., 452 US 264, 297 & n 40 (1981).

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Yet there is scant recognition of the evils that are endemic in this area and the social dislocations that can follow. The Supreme Court is quite content to require individual property-holders to file endless requests for variances with hostile zoning boards before considering a case at all. n125 None of the concerns with permits that dominate the First Amendment area carry over to the Takings Clause. Instead the Supreme Court has written: "[A]fter all, the very existence of a permit system implies that permission may be [*80] granted, leaving the landowner free to use the property as desired." n126 Oh?

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n125 Williamson Planning Comm'n v Hamilton Bank, 473 US 172, 186-88 (1985) (plaintiff seeking zoning approval had to exhaust all available administrative remedies, including petitioning the administrative agency for variances).

n126 United States v Riverside Bayview Homes, Inc., 474 US 121, 127 (1985). Lower courts have relied on Riverside Bayview to stifle challenges to rent control legislation. See, for example, Gilbert v City of Cambridge, 932 F2d 51, 56 (1st Cir 1991).

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This steadfast refusal to provide early and prompt remedies in takings cases is intimately tied to the basic propositions of takings law. The Supreme Court has noted that its own fuzzy standards of what constitutes a taking make it impossible to decide whether the government has misbehaved, and to decide what compensation, if any, to require before a matter has been brought to a close. n127 The upshot is that local governments are utterly free to ignore the interests of those whom they regulate, so long as they are willing to throw elaborate hurdles in the paths of those who would challenge their regulations. The risk of local bias and the social losses that follow from the partial or permanent development of property may well be great, but there is no way to force the issue to adjudication.

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n127 Williamson, 473 US at 199-200.

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Instead of the present rules that tolerate abusive behavior and foster costly delays, the system should be redone from the ground up. The permit system should be scrapped. Neighbors and local governments should be able to sue to enjoin the completion or operation of local land uses only by showing that there is some imminent (I would settle for serious) danger of external harms. Where the future harm is uncertain, and the project goes forward, then the landowner might be required to post bond to make good the losses that its conduct might impose on strangers.

The stakes on prior restraint may not be as high for property as they are for speech, although it is hard to be dogmatic on the point without knowledge of particular circumstances. But the relevant concern is not whether a prior restraint rule causes more mischief with speech than it does with property. Instead the concern is to apply sound rules in both areas. Toward that end, the rules developed in conjunction with the First Amendment should be used to reform the impoverished law of takings. The present attitude, which allows full administrative discretion without any judicial accountability, is one of the worst blemishes of the current system.

E. Question Five: Forced Exchanges

There is one last way to test the limitations of state power under the First and Fifth Amendments. To what extent does the state have the power to single out or select the target of its regulations? [*81] The general argument here is that the power to select certain practices or individuals for special government sanctions is an enormous government power that can easily fall prey to abuse. One application of this principle is that regulations do not on their face impose disproportionate burdens on similar activities. A rule that permits the state to impose sanctions on some but not on others, or even one that permits the state to impose heavier sanctions on one than on the other, is a peril against which every legal system should guard.

1. Selection bias.

a) Free speech. The importance of this selection bias is evident under the First Amendment, where the modern law imposes very heavy burdens on the state to use content-neutral instead of content-based regulations. Even if the content-neutral regulations are broader in their coverage than content-based regulations, the necessity of imposing burdens on friend and foe alike operates as an implicit but effective check against the abuse of government power. Thus a rule that prohibits all billboard advertisements is less dangerous than one that allows billboards for all purposes, save political campaigns, which in turn is far less dangerous than one that permits billboards to be used only by major political parties, or even by Democrats and not Republicans, or the reverse.

The key is that the total level of speech permitted is of less importance than the mix of speech allowed. n128 We would rather have a system in which both sides (of a two-sided issue) could speak with two units each than a system in which one side could speak with ten units of speech and the other none. The

constitutional theme becomes distortion and imbalance, and content-based distinctions that go to the merits of the ideas expressed are prime examples of the problem.

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n128 See Stone, 25 Wm & Mary L Rev at 197-200 (cited in note 29).

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b) Takings. The same question of political abuse and discretion can arise in connection with the regulation of property and economic liberties. As before, the power to select certain businesses or firms for regulation is easily abused by the political system. A rule that would subject margarine to heavier taxes than butter is one that gives a competitive advantage to the latter over [*82] the former. n129 A rule that bans plastic milk containers while allowing paper ones is subject to the same criticism. n130 A law that allows a zoning board selectively to designate certain parcels of lands as large-lot residential land and then to designate neighboring plots of land as commercial land carries with it the same risk. n131 In takings cases, there is some language suggesting that disproportionate impact will require the state to provide compensation for the property that it has taken. n132 But the case law has easily evaded its lofty rhetorical standard, and has sanctioned facially non-neutral government regulations that are ripe for abuse.

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n129 See McCray v United States, 195 US 27 (1904) (affirming the legislature's prerogative to tax margarine, but not butter).

n130 Minnesota v Clover Leaf Creamery Co., 449 US 456 (1981) (affirming state's right to distinguish between containers for environmental purposes).

n131 See Penn Central, 438 US 104 (landmark designation). See also note 83.

n132 See, for example, Armstrong v United States, 364 US 40, 49 (1960) (The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

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2. Taxation.

The difference in how speech and takings law treat selection bias can be most conveniently seen if we pay attention to one particular form of government action -- taxation. The taxation of newspapers, for example, could present a clear collision between the claims of free speech and the claims of government. Within a strongly libertarian world, the initial impulse is to say that institutions remain free only if they are not subject to tax at all. The usual libertarian formulation is that obligations are imposed upon parties to prevent the use of force, the commission of fraud, or the breach of promise. Taxation is premised on none of these rationales, and should therefore be illegal.

The point is not without historical precedent, for the rhetoric of free trade has on occasion been used by judges to excuse interstate commerce from all sorts of state taxation. n133 Over time, however, this "libertarian" position has been repudiated in favor of the view that state taxation of interstate commerce cannot be imposed on a discriminatory basis, n134 but can be imposed on a nondiscriminatory [*83] basis. This same approach is surely correct for speech and takings law as well.

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n133 Freeman v Hewit, 329 US 249, 252 (1946) ("state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states"); Spector Motor Service v O'Connor, 340 US 602, 610 (1951) (federal privilege of carrying on interstate commerce free from state taxation).

n134 See Complete Auto Transit, Inc. v Brady, 430 US 274, 287-89 (1977). For an exhaustive historical account of the subject, see Walter Hellerstein, State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication, 41 Tax Lawyer 37 (1987). For my views, see Richard A. Epstein, Bargaining with the State ch 9 (Princeton, forthcoming 1993).

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Thus First Amendment doctrine should take its cue, as indeed it has, from the cases regulating state taxation of interstate commerce. The basic principle is that the tax system works on a benefit theory of taxation, whereby the burdens associated with running a complex society are distributed pro rata to those institutions that benefit from its operations. The ability to pay the tax is irrelevant to the analysis. Protected by an antidiscrimination rule that covers all businesses, a newspaper that is subject to a tax has scant reason to complain, because the services provided from the taxes collected are equal or greater in value to the money surrendered to pay for them. Any nondiscriminatory system of taxation -- of which flat taxes are the best candidate -- should yield a net benefit to the newspaper taxed. Although the First Amendment has no explicit "just compensation" language that allows for forced exchanges beneficial to the taxed party, but imposed by the state, the eminent domain approach carries over to this situation, even if not formally acknowledged as such, in the cases.

The situation becomes more clouded when taxation is allowed to serve redistributive as well as protective ends, as in the welfare state. Then newspapers, along with all other taxed entities, could be systematically hurt by the tax, which then could be attacked on the ground that the costs imposed are an impediment to speech. This argument has been rejected, apparently without a struggle, on the ground that newspapers are not singled out for special treatment, and therefore obtain protection by anonymity: The resistance that others display to increased taxes protects newspapers against special oppression by the state, and hence against abuse. While it is quite likely that governments are willing to tax the press out of business, it is unlikely that they will set taxes to drive all businesses into bankruptcy. The protection afforded by the nondiscrimination rule may deviate from what is required by theories of optimal taxation, but it does afford important protection against invidious taxation by the state.

The litigated cases of taxation under the First Amendment are not concerned with the question of differential taxation rates between the press and other institutions. Instead they address the question of differential taxation among members of the press. What is instructive about this line of cases is that it develops a [*84] powerful argument for the use of flat taxation across firms, which has powerful application to the general question of taxation under the eminent domain power. In Grosjean v American Press Co. n135 the Supreme Court struck down a license tax, equal to two percent of gross receipts, that was levied only against publications in the state whose weekly circulation was in excess of 20,000. n136 At one level, the case was easy, for there was ample information in the record that the tax assumed this form because Senator Huey Long and his state henchmen wished to attack the major papers in the state that had criticized him. But the tax was also suspect on structural grounds, because it singled out some papers for special treatment. The Court relied on both rationales to strike down the tax, avoiding the question of whether the facial discrimination within the class was sufficient to condemn the class. n137

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n135 297 US 233 (1936).

n136 Id at 240.

n137 Id at 250-51.

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The structural issue was fairly raised in Minneapolis Star & Tribune Co. v Minnesota Commissioner of Revenue, n138 where the use tax in question was imposed on the print and ink used by all newspapers, with a $ 100,000 exemption per paper. n139 The Minneapolis Star attacked the tax for its discriminatory impact, noting that it bore the disproportionate brunt of the tax: only eleven out of 388 papers in the state paid any tax at all, and among that eleven, over two-thirds of the total tax ($ 608,634 out of $ 893,355) was paid by the Star alone. n140 The case raised none of the motive issues that clouded the legal question in Grosjean, n141 and the Court struck down the tax.

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n138 460 US 575 (1983).

n139 Id at 578.

n140 Id.

n141 Id at 580.

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The Court noted first that general economic regulations applicable to other business -- for example, the antitrust laws or the National Labor Relations Act -- could unquestionably be applied to the press. n142 But the Court then noted that the special use tax on print and ink, with its special exemption, was nowhere duplicated in the Minnesota tax code. n143 The tax was a form of "special taxation" that "[could not] stand unless the burden [was] necessary

to achieve an overriding governmental interest." n144 Thus the tax [*85] failed for two reasons: First, there was no reason to separate the press from the general system of taxation. Second, within the class of newspapers, there was no reason to impose a differential burden on the Star. The Court recognized that it was difficult to trace the economic consequences of any tax, and that, for all it knew, this tax might benefit newspapers relative to everyone else. But it found that safety necessitated that this tax conform with the others, both within the industry and across industries. n145

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n142 Id.

n143 Id at 582.

n144 Id.

n145 Id at 585.

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In short, the state had a compelling interest in collecting revenue which justified imposing a tax, but not for imposing a tax of this form. "If the real goal of this tax is to duplicate the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax." n146 The Court was quite suspicious of the unequal distribution of the tax across members of the press. The Court's language is worth quoting in full.

Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general. And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises. n147

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n146 Id at 587-88.

n147 Id at 591-92 (footnotes omitted).

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The point can be made more simply. Whatever revenue target the state wishes to achieve under its sales tax can be achieved by a flat tax across all firms

in all industries, without any possibility of [*86] political abuse. Arguments in this form, however, apply not only to enterprises that fall within the scope of the First Amendment, but across the board. To give only the most notorious example, the windfall profits tax was sustained by the Supreme Court in the teeth of an explicit uniformity challenge (Alaskan north-slope oil was taxed differently), which was given the typically low standard of review that has been applied to economic matters, regardless of which clause of the Constitution they arise under. n148 But in this situation, it is difficult to figure out any sensible justification for the differential tax treatment, given that subsidies distort choices in economic markets in the same way they do in the market for speech and ideas. There are no special social costs involved in the production of oil (that is, those costs which cannot be handled by direct control of pollution), and ability to pay is irrelevant in the larger economic context as in the speech case. Similarly, it is beside the point to observe that the tax may be passed on to consumers or back to suppliers, for a flat tax surely achieves that result while sparing the court the impossible economic inquiry of tracing out the incidence of the tax burden. n149

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n148 United States v Ptasynski, 462 US 74 (1983).

n149 For a more extensive development of this point, see Epstein, Takings at 290-92 (cited in note 2).

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Point by point, then, the intellectual case against all forms of special taxation is identical in all its particulars to those developed by Justice O'Connor in Minneapolis Star. Unless there is some reason, of which I am unaware, why the modern preoccupations with baselines and just initial entitlements alter the results, there seems to be no reason why the arguments in Minneapolis Star should not be used to strike down the industry-specific special taxes that litter the present landscape.

Can the argument be carried still one step further? One way to look at the tax in Minneapolis Star is that it was a system of progressive taxation, in which most newspapers paid no tax, and the largest ones paid over four percent for print and ink costs in excess of $ 100,000. Surely the outcome in the case would have been identical if there had been a two percent tax on print and ink purchases between $ 100,000 and $ 250,000. In essence, what the Court has said is that progressive taxation on different members of the press is unconstitutional under the First Amendment because of the differential burdens that it imposes. Why does the same argument not apply with respect to a progressive tax generally? So long as the state can meet its budgets generally, then there is no [*87] reason why it should not adopt that form of tax which is least capable of abuse, and most amenable to judicial supervision to reach its goals.

IV. RECONCILING THE WELFARE STATE WITH ECONOMIC LIBERTIES

Now we reach the crux of the difference between private property and economic liberties on the one hand, and freedom of speech on the other. There is, as Minneapolis Star tells us, no case for income redistribution within the domain of speech, and indeed strong reasons to oppose it. But the same argument

cannot be made with the same force with regard to income redistribution in general.

The case against income redistribution must come to grips with the common perception -- the only perception that makes charitable assistance to the poor intelligible -- that a dollar of income is worth more to a poor person than to a rich one. It can only overcome that perception by showing that the ostensible gains from redistribution are wholly outweighed by the manifold practical obstacles to effective redistribution, and by the unfortunate incentive effects for the creation of wealth that redistribution creates. It is very clear, notwithstanding the mythic significance that some attach to it, n150 that Lochner did not stand for the proposition that all forms of income redistribution and welfare measures were prohibited, if only because these were routinely upheld by the Court against all forms of challenges before Lochner was decided in 1905, and before it was overthrown after 1937. n151

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n150 See, for example, Sunstein, 87 Colum L Rev 873 (cited in note 1).

n151 See, for example, Bell's Gap R.R. Co. v. Pennsylvania, 134 US 232 (1890). On the breakdown of the limitations on taxation, see Clyde E. Jacobs, Law Writers and the Courts (California, 1954). Note that the tax in Pollock v Farmers' Loan & Trust Co., 157 US 429 (1895), was also progressive, but was not struck down on that ground. See also New York Trust Co. v Eisner, 256 US 345 (1921) (sustaining a progressive estate tax).

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The question thus arises whether the lessons on disproportionate impact and discriminatory taxation applied with such diligence can be carried over into the welfare state, where by definition some form of income and wealth redistribution is routinely allowed, notwithstanding the explicit anti-redistributive language of the Takings Clause. I think that this reconciliation can take place, and on grounds that should be able to draw the consent of liberals and conservatives alike. The outline of the compromise, which I have [*88] proposed before, n152 is that the state can redistribute as much as it likes from rich to poor so long as it does so through general revenue taxes. There is of course some room for redistribution even with the flat tax on income. This proposal waives all objections to progressive taxation, but insists only that the remainder of the structure protecting private property and economic liberties be respected and enforced. If the state wants to provide individuals with below market housing, then it can rent the units from private owners at market levels, relet them to poorer citizens at below market levels, and make up the difference by a tax on general revenues. The program thus places the cost of this public good (as redistribution has become) on the public at large, where in fairness and justice it belongs. The public at large has decided that the change is appropriate and thus should foot the bill for initiatives that the landowner may well have opposed. What can be done with rent control can be done with zoning, with specialized facilities for the handicapped, with subsidized health insurance for AIDS victims, and with educational vouchers for the poor. If one can make a gift transaction to the poor, it is always possible to fund it out of general revenues.

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n152 See Richard A. Epstein, Takings: Of Maginot Lines and Constitutional Compromises, in Ellen Frankel Paul and Howard Dickman, eds, Liberty, Property, and the Future of Constitutional Development 173 (SUNY, 1990).

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The justification for this approach has thus far been phrased in the distributive language used by Justice Black in his well known quotation from Armstrong. n153 But it bears repetition that the shift in financing procedure has vast implications for both democratic theory and economic efficiency. As regards the former, it encourages responsible behavior by citizens, who are no longer in the position to vote revenues for group A out of the pocket of group B. The tendency to play special interest politics will be eased by the requirement that participation entails the right to control but also entails the obligation to bear imposed obligations with one's fellow citizens. Even staunch defenders of republican virtue should prefer a responsible citizenry to the powerful one, and this reconciliation of the Takings Clause with the welfare state achieves just that end.

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n153 See note 132.

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The efficiency argument is every bit as powerful. The nature of the programs that will be funded will differ as the method for funding those programs changes. The situation in which the voters at large can shift all the costs of running the welfare state to a tiny [*89] fraction of the population contains a built-in externality: one group decides, and another group pays. The usual economic conclusion about externalities applies: too much of the good will be demanded relative to other goods that might be purchased, a conclusion that applies even when one good is aid to the poor and the other is repaving the public streets. Correct voting procedure neutralizes some of the externalities that are otherwise implicit in the current system that invites disproportionate funding, not only of welfare payments, but of any imaginable government expenditure (whether or not pure public goods). A system that more accurately measures the public sympathy and support for various programs is surely preferable to one that so skews the inquiry that the level of production of welfare payments, relative to other goods, is excessive. The total level of goods and services should increase as well, which increases the size of the base available for redistributive purchases. Even a post-New Deal legislature, however aware of the evils of common law baselines, can only redistribute through the political process what is produced through the economic one.

Finally the proposal places a limitation on the nature and kinds of redistribution that are feasible: There is redistribution along one dimension only, from rich to poor, for it is only along that line that one can assume that a single unit of wealth means more to the recipient than it does to the donor. Gone are the days therefore of the inveterate agricultural subsidies that benefit corporate farmers at the expense of poor ghetto dwellers, and gone are the days when exclusionary zoning can keep poor people out of affluent suburbs. If redistribution of wealth from rich to poor is the goal, then a court can

scrutinize the program in question to see that there is a reasonable means-end connection. The welfare state is thus reconcilable with the Bill of Rights in an imperfect but powerful way. It remains to see whether the inveterate judicial temperament keeps us chained to a jurisprudence of economic liberty that has stifled the power and initiative of this country for the last fifty years, indeed longer.

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EXCHANGE; RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS: Religious Freedom at a Crossroads

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SUMMARY:

... The old jurisprudence failed to distinguish between government action that promotes the free exercise of diverse faiths and government action that promotes the majority's understanding of proper religion -- treating both with suspicion. ... In a 1987 opinion joined by Chief Justice Rehnquist, Justice Scalia urged "[a]bandoning" the first prong of the Lemon test, the requirement of a "secular purpose." ... A more prominent alternative to the Lemon test is the so-called "endorsement test," first proposed by Justice O'Connor in a concurring opinion and sporadically embraced by opinions for the Court in subsequent cases. ... The endorsement test casts suspicion on government actions that convey a message that religion is worthy of particular protection -- as any accommodation of religion necessarily does -- and thus encourages indifference toward religion. ... If our reasonable observers know the "values" underlying the Religion Clauses, and if those values are something other than endorsement and disapproval, what need have we of the endorsement test? We should look directly to the principles of the Free Exercise and Establishment Clauses and not be waylaid by issues of perception. ... To be sure, the coercion test (in contrast to the endorsement test) will eliminate claims by persons whose only complaint is that the government action irritates or offends them; being irritated is not the same as being influenced ("proselytized") by government action. ...

TEXT:

[*115] The Religion Clause jurisprudence of the Warren and Burger Courts is coming to an end -- a victim, if not of its own internal contradictions, then of changes of personnel on the Court. To this we might happily say "good

riddance," for a more confused and often counterproductive mode of interpreting the First Amendment would have been difficult to devise. Professor Leonard Levy observed that

> the Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices. n1

I stand at a pole opposite to Levy on most of these issues, but I agree with that assessment.

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n1 Leonard Levy, The Establishment Clause: Religion and the First Amendment 163 (MacMillan, 1986).

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The old jurisprudence failed to distinguish between government action that promotes the free exercise of diverse faiths and government action that promotes the majority's understanding of [*116] proper religion -- treating both with suspicion. The Court's conception of the First Amendment more closely resembled freedom from religion (except in its most private manifestations) than freedom of religion. n2 The animating principle was not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life touched by government. This approach successfully warded off the dangers of majoritarian religion, but it exacerbated the equal and opposite danger of majoritarian indifference or intolerance toward religion. There is reason to believe this period is coming to an end.

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n2 Thus, Justice Blackmun could say that the term "secular liberty" encapsulates what "it is the purpose of the Establishment Clause to protect." County of Allegheny v ACLU, 492 US 573, 612 (1989). In a similar vein, Justice Frankfurter commented that the "essence" of the "constitutional protection of religious freedom" is "freedom from conformity to religious dogma, not freedom from conformity of law because of religious dogma." West Virginia Board of Education v Barnette, 319 US 624, 653 (1943) (Frankfurter dissenting).

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There is no guarantee, however, that the Rehnquist Court's approach to the Religion Clauses will be a great improvement. Initial decisions suggest that the Rehnquist Court may replace the reflexive secularism of the Warren and Burger Courts with an equally inappropriate statism. Just when the Court appears to be shedding its inordinate distrust of religion, it appears to be embracing an inordinate faith in government.

Already the new Court has adopted an interpretation of the Free Exercise Clause that permits the state to interfere with religious practices -- even to make the central ceremonies of some ancient faiths illegal or impossible -- without any substantial justification, so long as the regulation does not facially discriminate against religion. n3 And in a prominent case before the

Court this term, the Court has been urged to modify its interpretation of the Establishment Clause to permit a clergyman to deliver a prayer at a junior high school graduation ceremony. n4 As the arguments in the invocation case illustrate, the debate over the Religion Clauses is all too often framed as if there were but two choices: more religion in public life or less; tearing down the wall of separation between church and state or building it up again. Opponents of the prayer have rallied around the Supreme Court's old Establishment Clause doctrine and have warned that any modifications would signal an erosion in our civil liberties. Defenders of the prayer contend that the government should have broader latitude to give voice to the religious sentiments of the community. Both positions, in my judgement, [*117] are wrong. We should welcome doctrinal change, but not government prayer.

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n3 Employment Division v Smith, 110 S Ct 1595, 1599-1602 (1990).

n4 Weisman v Lee, 908 F2d 1090 (1st Cir 1990), cert granted, 111 S Ct 1305 (1991).

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This Article presents another way. In Section I, I criticize the Religion Clause jurisprudence of the Warren and Burger Courts and its influence today. In Section II, I explain why the emerging Religion Clause jurisprudence of the Rehnquist Court appears to be moving in the wrong direction. Finally, in Section III, I suggest how a proper jurisprudence of the Religion Clauses should look. My position is that the Religion Clauses do not create a secular public sphere, as was often thought in the past; n5 nor do they sanction government discretion to foster broadly acceptable civil religion in public life. Rather, the purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or hindering religion. It is to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism. It is to preserve what Madison called the "full and equal rights" n6 of religious believers and communities to define their own way of life, so long as they do not interfere with the rights of others, and to participate fully and equally with their fellow citizens in public life without being forced to shed their religious convictions and character.

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n5 And as Professor Sullivan thinks today. See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U Chi L Rev 195 (1992).

n6 James Madison (speech of Jun 8, 1789), in Joseph Gales, ed, 1 Annals of Congress 451 (Gales & Seaton, 1834).

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I. THE OLD JURISPRUDENCE AND ITS INFLUENCE TODAY

A. Inconsistency and Confusion

Any serious interpretation of the Religion Clauses must explain the relation between the two constituent parts, the Free Exercise Clause and the Establishment Clause, which are joined together in the single command: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." n7 The Free Exercise Clause forbids Congress (and, after incorporation through the Fourteenth Amendment, any government) to discriminate against religion, and may require affirmative accommodation of free exercise in some contexts. The Establishment Clause, however, has been interpreted to forbid the government to aid or advance religion. In a world in which the government aids or advances many different causes and institutions, [*118] this means that the government must discriminate against religion in the distribution of benefits. Thus the Establishment Clause is said to require what the Free Exercise Clause forbids.

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n7 US Const, Amend I.

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The doctrinal confusion is compounded when we take into account the remainder of the First Amendment, which protects the freedoms of speech, press, petition, and assembly. The central feature of the constitutional law of speech and press is a prohibition on "content-based" discrimination, n8 except in the most compelling of circumstances. Yet the distinction between religion and nonreligious ideologies and institutions -- a distinction seemingly demanded by the very text of the Religion Clauses -- is based on the content of ideas and beliefs. The content-neutral thrust of the Free Speech Clause thus coexists uneasily with the special status of religion under the Free Exercise and Establishment Clauses.

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n8 See Geoffrey Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 196-97 (1983); Martin Redish, The Content Distinction in First Amendment Analysis, 34 Stan L Rev 113, 113 (1981); Laurence H. Tribe, American Constitutional Law @ 12-2 at 789-92 (Foundation, 2d ed 1988). For a case involving interplay of free exercise, establishment, and free press concerns, see Texas Monthly, Inc. v Bullock, 489 US 1 (1989). See especially id at 25-26 (White concurring).

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The Court has tended to address these problems one clause at a time, building up inconsistencies often without seeming to notice them. But more remarkably yet, the Court has contrived a formula for interpreting the Establishment Clause that contains inconsistencies within a single test. The aptly named "Lemon" test, adopted in 1971, forbids government actions that either (1) have no secular purpose; (2) have a "primary effect" of advancing religion; n9 or (3) foster an "excessive entanglement" between government and religion. n10 In further elaborations, the Court has held that "primary effect" really means any "direct and immediate" effect: n11 [*119] the state must be "certain" that religious organizations receiving government financial assistance for secular services to the public do not use resources purchased with those funds for the teaching or promotion of religion. n12 However, the Court has also interpreted

the "entanglement" test to forbid the monitoring or surveillance of religious organizations necessary to achieve this certainty. n13 Thus, the "entanglement" prong forbids what the "effects" prong requires -- leaving states no alternative but to exclude religious groups altogether. The Court has acknowledged this "Catch-22," n14 but has not done anything to resolve the contradiction.

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n9 The "effects" test by its language forbids government action with the "primary effect" of either "advancing" or "inhibiting" religion. Lemon v Kurtzman, 403 US 602, 612 (1971). But in actual practice, actions "inhibiting" religion are dealth with under the Free Exercise Clause. The only instance in which the Supreme Court has invalidated an "inhibition" of religion under the Establishment Clause was Larson v Valente, 456 US 228 (1982), and the reasoning in that case was based on denominational discrimination. For clarity's sake I have confined the "effects" prong of the Lemon test to "advancement" of religion.

If Smith, 109 S Ct 1595, is extended to questions of institutional autonomy, as seems likely (but see id at 1599 (citing the church property dispute cases)), litigants and lower courts are likely to invoke the Establishment Clause more often to challenge laws impinging on the ability of religious organizations to control their internal affairs and organization. See Rayburn v General Conference of Seventh-Day Adventists, 772 F2d 1164, 1169-71 (4th Cir 1985) (striking down application of Title VII to hiring of clergy on establishment as well as free exercise grounds). See generally Carl Esbeck, Establishment Clause Limits on Governmental Interference with Religious Organizations, 41 Wash & Lee L Rev 347 (1984).

n10 Lemon, 403 US at 613.

n11 Committee for Public Educ. v Nyquist, 413 US 756, 783-85 n 39 (1973).

n12 Lemon, 403 US at 619; Grand Rapids School Dist. v Ball, 473 US 373, 385-86 (1985).

n13 Aguilar v Felton, 473 US 402, 409 (1985); Meek v Pittenger, 421 US 349, 370 (1975); Lemon, 403 US at 619.

n14 Bowen v Kendrick, 487 US 589, 615 (1988).

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With doctrine in such chaos, the Warren and Burger Courts were free to reach almost any result in almost any case. Thus, as of today, it is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers, n15 but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to. n16 It is unconstitutional for a state to require employers to accommodate their employees' work schedules to their sabbath observances, n17 but constitutionally mandatory for a state to require employers to pay workers compensation when the resulting inconsistency between work and sabbath leads to discharge. n18 It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior, n19 but not to teach them science or history. n20 It is constitutional for the government to provide religious

school pupils with books, n21 but not with maps; n22 with bus rides to religious schools, n23 but not from school to a museum on a field [*120] trip; n24 with cash to pay for state-mandated standardized tests, n25 but not to pay for safety-related maintenance. n26 It is a mess.

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n15 Marsh v Chambers, 463 US 783, 792-93 (1983).

n16 Wallace v Jaffree, 472 US 38, 56 (1985).

n17 Estate of Thornton v Caldor, Inc., 472 US 703, 709-10 (1985).

n18 Frazee v Employment Security Dept., 489 US 829, 834 (1989); Hobbie v Unemployment Appeals Comm'n of Fla., 480 US 136, 138-40 (1987); Sherbert v Verner, 374 US 398, 403-4 (1963).

n19 Kendrick, 487 US at 611.

n20 Lemon, 403 US at 618-19.

n21 Board of Education v Allen, 392 US 236, 238 (1968).

n22 Wolman v Walter, 433 US 229, 249-51 (1977).

n23 Everson v Board of Education, 330 US 1, 17 (1947).

n24 Wolman, 433 US at 252-55.

n25 Committee for Pub. Educ. and Religious Liberty v Regan, 444 US 646, 653-54 (1980).

n26 Nyquist, 413 US at 774-80.

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B. Hostility or Indifference Toward Religion

But analytical confusion was the least of the problems with the Religion Clause jurisprudence of the Warren and Burger Courts. More significant was the Court's tendency to press relentlessly in the direction of a more secular society. The Court's opinions seemed to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere. When religions stuck to the private functions of "spiritual comfort, guidance, and inspiration," n27 the Court extended the protection of the Constitution. But the Court was ever conscious that religion "can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions." n28 The Court's more important mission was to protect democratic society from religion. n29

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n27 Grand Rapids, 473 US at 382.

n28 Id.

n29 See Justice Stevens's dissenting opinion in Board of Education of Westwide Community Schools v Mergens, 110 S Ct 2356, 2383-93 (1990), in which he described religions as "divisive forces," id at 2391, and urged that they be excluded from public school premises on the ground that they "may exert a considerable degree of pressure even without official school sponsorship." Id (emphasis added). Stevens's language reflects a belief that the Establishment Clause is concerned not so much with the power of government as with the dangerous propensities of religion. By 1990, Justice Stevens was no longer speaking for a majority, but his comments indicate that the secularistic orientation of the old jurisprudence lives on.

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This set the Religion Clauses apart from the remainder of the Bill of Rights, which protects various nongovernmental activities from the power of democratic majorities. n30 Only the Religion Clauses have been interpreted to protect democratic society from the power of the private citizen, even from the supposed power of minority religions. (Consider the parochial school aid cases, which protect the non-Catholic majority from the Catholic minority.) The explanation presumably lies not in the logic of the Bill of [*121] Rights but in the Court's perception of religion. Before examining the details of legal doctrine, then, let us look at how the Court talks about religion.

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n30 Akhil Reed Amar has recently interpreted the Bill of Rights primarily to empower popular majorities rather than to protect individual rights. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L J 1131, 1132 (1991). But the Court's approach to the Religion Clauses is no less peculiar under Amar's interpretation, for Amar suggests that churches should be understood as republican institutions -- as vehicles for the mobilization of public opinion. Amar's view is inconsistent with the view that churches should be quarantined from public life.

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Justice Hugo Black provides a starting point, since his opinions were so extremely influential in the early development of Establishment Clause doctrine. Black referred to the Catholics who advocated the loan of textbooks to religious schools as "powerful sectarian religious propagandists," and to their religious views as "preferences and prejudices." n31 He accused them of "looking toward complete domination and supremacy of their particular brand of religion." n32 This was a strange way to talk about people who sought equal rights for all families to direct the upbringing of their children.

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n31 Allen, 392 US at 251 (Black dissenting).

n32 Id.

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The bigotry of Justice Black's language is particularly striking in light of its historical context. The reason Roman Catholics and Orthodox Jews created separate schools in the nineteenth century, while Protestants did not, was that the public schools were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching. n33 Opposition to parochial school aid at that time was part and parcel of nativist, anti-Catholic politics. n34 The same presidential candidate whose supporters campaigned against "Rum, Romanism, and Rebellion" put his name to an almost-adopted constitutional amendment that would have banned aid to parochial schools. n35 Only in the mid-twentieth century, when overt anti-Catholicism had subsided, were legislatures in Protestant-majority states willing to consider sharing a modest portion of the resources available for education. n36 For Justice Black to portray these minorities as "looking toward complete [*122] domination and supremacy of their particular brand of religion" was to turn reality on its head. n37

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n33 For a review of this history, see Michael W. McConnell, Multiculturalism, Majoritarianism and Educational Choice: What Does Our Constitutional Tradition Have to Say?, 1991 U Chi Legal F 123, 134-39; Charles L. Glenn, Jr., The Myth of the Common School (Massachusetts, 1988); Jonathan D. Sarna, American Jews and Church-State Relations: The Search for "Equal Footing" (American Jewish Committee, 1989).

n34 See generally Diane Ravitch, The Great School Wars (Basic, 1974).

n35 The candidate was James G. Blaine. See Allen Johnson, ed, 2 Dictionary of American Biography 322, 326 (Charles Scribner's Sons, 1943). On the Blaine Amendment, see Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States 434 (Harper and Row, rev ed 1964).

n36 In New York, for example, the first enactment of parochial school aid was the provision of bus transportation, passed in 1936. See Stokes and Pfeffer, Church and State in the United States at 425 (cited in note 35).

n37 Allen, 392 US at 251. Justice Black was not the only Supreme Court Justice who indulged anti-Catholic prejudice. In Lemon, Justice William O. Douglas cited with approval an openly anti-Catholic hate tract. Lemon, 403 US at 635 n 20 (Douglas concurring) (quoting Loraine Boettner, Roman Catholicism (Presbyterian and Reformed Publishing, 1962)). Among other illuminating statements, Boettner claimed that Hitler, Mussolini, and Stalin learned the "secret[s] of [their] success" from the Roman Catholic Church, Boettner, Roman Catholicism at 363, and that "an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets come . . . from the [Catholic] parochial schools." Id at 370. For a further description of the book, see Douglas Laycock, Civil Rights and Civil Liberties, 54 Chi Kent L Rev 390, 418-21 (1977).

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The language in recent Supreme Court opinions is more guarded, but continues to evince suspicion of religion. In Grand Rapids School District v Ball, n38 and its companion case, Aguilar v Felton, n39 for example, the Court refused to allow public school remedial teaching specialists to enter the premises of

parochial schools to provide remedial and other special assistance to educational and economically deprived schoolchildren attending those schools. n40 Writing for the Court, Justice William Brennan explained that

> teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect. n41

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n38 473 US 373 (1985). Readers should be aware that the author argued this case in the Supreme Court in support of the petitioner.

n39 473 US 402 (1985).

n40 Grand Rapids, 473 US at 397; Aguilar, 473 US at 414.

n41 Grand Rapids, 473 US at 388.

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The evocative words in this passage -- "conform," "dominantly religious," "indoctrination" -- suggest that the Justices who joined the opinion believe that religious convictions are reached not through thoughtful consideration and experience but through conformity and indoctrination. This view of religion justifies discriminating against religious schools, because indoctrination is the antithesis of democratic education. Moreover, the Justices seemed to view religion as not only unreasoned but insidious. The "atmosphere" of a Catholic school has such power to influence the unsuspecting mind that it may move even public school remedial English and math specialists to "conform" -- though their only contact with the school is to walk down its halls.

[*123] This opinion stands in curious contrast to the Court's encomiums to the role of the public schools in inculcating moral values. The same Justice who wrote of "indoctrination" in the religious schools observed in another case that "local [public] school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values.'" n42 He reasoned that "'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" n43 In another opinion, the Court stated that the "inculcat[ion of] fundamental values" by public schools was "necessary to the maintenance of a democratic political system." n44 The Court seems to believe that a politically elected school board's inculcation of secular values for all schoolchildren of the jurisdiction is "necessary" for democracy. When individual parents choose an alternative set of (religious) values for their own children, however, this is "indoctrination" and must be viewed with suspicion.

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n42 Board of Education v Pico, 457 US 853, 864 (1982) (Brennan plurality).

n43 Id (quoting Petitioner's Brief at 10) (footnote omitted).

n44 Ambach v Norwick, 441 US 68, 77 (1979).

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This understanding of religion is not merely the idiosyncratic viewpoint of a transitory majority of the Court. It represents a specific and powerful philosophical position, most clearly articulated by John Dewey. Dewey, the leading philosophical influence on American secular liberalism, was a determined critic of traditional religion. He claimed that there was "nothing left worth preserving in the notions of unseen powers, controlling human destiny to which obedience, reverence and worship are due." n45 Unlike the scientific method, which is "open and public" and based on "continued and rigorous inquiry," n46 religion is "a body of definite beliefs that need only to be taught and learned as true." n47 Religion, he said, is based on the "servile acceptance of imposed dogma." n48 This did not mean that Dewey and his followers were skeptical toward all moral teaching, or that the government should remain "neutral" toward conflicting points of view. To the contrary, Dewey contended that the public schools have an "ethical responsibility" to inculcate social values derived from scientific and democratic principles. n49

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n45 John Dewey, A Common Faith 7 (Yale, 1934).

n46 Id at 26, 39.

n47 Id at 39.

n48 Id at 5.

n49 John Dewey, Moral Principles in Education 7-10 (Southern Illinois, 1975). Inculcating these social values was a major theme in Dewey's work. See John Dewey, John Dewey On Education: Selected Writings 23-60, 295-310 (Modern Library, 1964); John Dewey, The School As A Means of Developing a Social Consciousness and Social Ideals in Children, 1 J Soc Forces 513 (1923). I do not mean to take a position here on whether Dewey's nontheistic philosophy is a "religion," a subject that is embroiled in the controversy over "secular humanism." For a thoughtful and sympathetic analysis of Dewey's "religion," see Steven C. Rockefeller, John Dewey: Religious Faith and Democratic Humanism (Columbia, 1991). For present purposes, the relevant point is that Dewey opposed all traditional theistic religion, supernaturalism, and metaphysical idealism, and thought that government should use education to impose an alternative secular morality.

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[*124] Dewey's point of view maintains a hold on mainstream thinking about religion and constitutional law, both in the academy and in the courts. Professor Kathleen Sullivan, for example, advocates the secularization of the public order on the ground that "the culture of liberal democracy" is constitutionally privileged over religious ideas. She quite frankly calls for "establishment of the secular public moral order." n50 Professor Ira Lupu argues that a vigorous protection of the free exercise of religious institutions "may undercut the project of constitutional democracy," because religions "frequently claim divine inspiration" and thus "discourage skepticism." n51 The Supreme

Court's education decisions stand in this Deweyite tradition, treating religious education as "indoctrination," while sanctioning secular moral education in the public schools. Whether the Justices were aware of it or not, their opinions reflected a philosophical position avowedly hostile to traditional religion.

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n50 Sullivan, 59 U Chi L Rev at 198 (cited in note 5). Sullivan's "establishment" is expressly theological in nature. She explains that the civil moral order she sees embodied in the Constitution must be understood "not as a neutral modus vivendi, but rather as a substantive recognition that there is more than one path to heaven and not so many as once thought to hell." Id at 200. This is not the disestablishment of religion. It is the establishment of Unitarian-Universalism.

n51 Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U Pa L Rev 555, 597 (1991). Ironically, though reasoning from a similar indictment of religion, Sullivan and Lupu reach opposite conclusions. Sullivan advocates strong protection for religious autonomy in the private sphere, but would exclude religious groups entirely from public programs. Lupu would provide no protection for religious institutional autonomy, but would allow religious groups (if they can survive government regulation intact) to participate in public programs, including education, on an equal basis.

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If the Court's education decisions sometimes reflected hostility toward religion, other decisions more often displayed indifference or incomprehension. In Estate of Thornton v Caldor, Inc., for example, the Court held it unconstitutional for a state to require employers to accommodate work schedules to their employees' days of sabbath observance. n52 In a concurring opinion, Justice O'Connor explained that

[*125] [a]ll employees, regardless of their religious orientation, would value the benefit which the statute bestows on sabbath observers -- the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. n53

It would come as some surprise to a devout Jew to find that he has "selected the day of the week in which to refrain from labor," since the Jewish people have been under the impression for some 3,000 years that this choice was made by God. n54 Jewish observers do not seek the right to "select the day" in which to refrain from labor, but only the right to obey laws over which they have no control. Sabbath observers are not "favored" over co-workers, any more than injured workers are "favored" when given disability leave. The law simply alleviates for them a conflict of loyalties not faced by their secular co-workers. Justice O'Connor's error was to reduce the dictates of religious conscience to the status of mere choice. Some people like to go sailing on Saturdays; some observe the Sabbath. How could the State consider the one "choice" more worthy of respect than the other? In Stephen Carter's apt phrase, this is to "treat religion as a hobby." n55

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n52 Estate of Thornton, 472 US at 708-10.

n53 Id at 711 (O'Connor concurring).

n54 See Exodus 20:9-10 (Revised Standard Version) ("Six days you shall labor, and do all your work; but the seventh day is a Sabbath to the Lord your God"). See also Nathan A. Barack, A History of the Sabbath 8-16 (Jonathan David, 1965).

n55 Stephen Carter, Evolutionism, Creationism, and Treating Religion As A Hobby, 1987 Duke L J 977.

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In Lyng v Northwest Indian Cemetery Protective Ass'n, the Supreme Court considered whether the Forest Service constitutionally could construct a logging road in a National Forest through the ancient sites of worship of the Yurok, Karok, and Talowa Indians of Northern California. n56 This road, the Court conceded, would "virtually destroy" the Indians' ability "to practice their religion." n57 The Supreme Court nonetheless upheld the project without inquiring whether its purpose was "compelling" n58 or even important. The Court explained that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." n59 One might think that the government would have to give some substantial justification to destroy a religion. [*126] But the Court responded that free exercise rights "do not divest the Government of its right to use what is, after all, its land." n60 There is, admittedly, no evidence of hostility to religion in the opinion, only indifference -- an indifference so obvious that the Court was moved to warn that "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizens." n61 But how could the opinion be read any other way?

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n56 485 US 439, 441-42 (1988).

n57 Id at 451.

n58 See discussion of the "compelling interest" test in text accompanying notes 67-70.

n59 485 US at 452.

n60 Id at 453 (emphasis in original). One might ask from whom the government got the land, but that, evidently, is another question.

n61 Id.

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These decisions do not give the impression that the Justices consider religion a particularly important aspect of life. Freedom of worship may be worthwhile in the abstract, but it is outweighed by virtually any secular interest. In its attitude toward religion, the Court may typify the gulf

between a largely secularized professional and academic elite and most ordinary citizens, for whom religion commonly remains a central aspect of life. n62 How many of the Justices and their clerks have had personal experience with serious religion -- religion understood as more than ceremony, as the guiding principle of life? n63 How many have close friends or associates who have had such experiences? For those who have lived their lives among academics and professionals, it may be difficult to understand why believers attach so much importance to things that seem so inconsequential.

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n62 John Davidson Hunter, Culture Wars (Basic, 1991). For discussions of the differences in religious conviction between the most educated classes and other Americans, see Robert Wuthnow, The Restructuring of American Religion 161-64 (Princeton, 1988); George Marsden, Are Secularists the Threat? Is Religion the Solution?, in Richard J. Neuhaus, ed, Unsecular America 31, 32-33 (Eerdmans, 1986); Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 Pa L Rev 149, 170-77 (1991).

n63 The backgrounds of some of the recent appointees suggest a more intensive engagement with religious life. It will be interesting to see how this affects the tone and reasoning of the Court's work in this area.

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The religious symbol cases are a final example of the Court's uncomprehending attitude toward religion. According to the Court, a city may include the display of a religious symbol as part of a holiday celebration only if the religious symbol is in close proximity to secular objects, which mitigate its religious message. Thus, a plurality of the Court permitted the menorah in County of Allegheny v ACLU because it was next to a forty-five-foot tall Christmas tree, n64 and a majority permitted the nativity scene in Lynch v Donnelly because it was surrounded by a Santa Claus house, reindeer, [*127] candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a banner stating "Season's Greetings," and a talking wishing well. n65 In contrast, the Court held unconstitutional the nativity scene in Allegheny, which was tastefully displayed with a backdrop of greenery and poinsettias, but unaccompanied by secular signs of the season. n66 Practitioners have dubbed the holdings in Lynch and Allegheny "the three-plastic animals rule."

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n64 492 US 573, 617-18, 634-35 (1989).

n65 465 US 668 (1984). See also Allegheny, 492 US at 596.

n66 Allegheny, 492 US at 598-600.

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The Court appears to have arrived at the worst of all possible outcomes. It would be better to forbid the government to have religious symbols at all than to require that they be festooned with the trappings of modern American materialism. After all, no one's religion depends on whether the government

displays the symbols of the Christian and Jewish holidays. But if there are to be religious symbols, they should be treated with respect. To allow them only under the conditions approved by the Court makes everyone the loser.

The religious symbols cases are themselves the perfect symbol of the Supreme Court's attitude toward religion. The Court does not object to a little religion in our public life. But the religion must be tamed, cheapened, and secularized -- just as religious schools and social welfare ministries must be secularized if they are to participate in public programs that are supposed to be open to all. Authentic religion must be shoved to the margins of public life; even there, it may be forced to submit to majoritarian regulation.

C. Legal Doctrine

The formal legal doctrines espoused by the Warren and Burger Courts reinforced their lack of sympathy for religion. This may seem not to be true of the Free Exercise Clause doctrine, under which the Warren and Burger Courts forbade the enforcement of laws burdening the exercise of religion unless necessary to achieve a compelling governmental interest. The compelling interest test is, after all, the most exacting level of constitutional scrutiny. But in the years between the test's formal appearance in 1963 n67 and its formal abandonment in 1990, n68 the Supreme Court rejected all but one claim for free exercise exemption outside the field of unemployment [*128] compensation. n69 In every other case decided on the merits, the Court found either that the claimant's exercise of religion was not burdened or that the government's interest was compelling. n70 The doctrine was supportive, but its enforcement was halfhearted or worse.

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n67 Sherbert, 374 US 398.

n68 Smith, 110 S Ct 1595.

n69 The exception was Wisconsin v Yoder, 406 US 205 (1972).

n70 Jimmy Swaggart Ministries v Bd. of Equalization, 493 US 378, 391-92 (1990) (not burdened); Bowen v Roy, 476 US 693, 709 (1986) (not burdened); Tony and Susan Alamo Foundation v Sec'y of Labor, 471 US 290, 303-05 (1985) (not burdened); Bob Jones Univ. v United States, 461 US 574, 604 (1983) (compelling interest); United States v Lee, 455 US 252, 258-59 (1982) (compelling interest); Hernandez v Comm'r of Internal Revenue, 490 US 680, 682 (1989) (probably no burden; in any event, compelling interest).

In special contexts, including prisons, the military, and the use of government land, the Court did not even purport to apply the test. See O'Lone v Estate of Shabazz, 482 US 342 (1977); Goldman v Weinberger, 475 US 503 (1986); Lyng v Northwest Indian Cemetery Protective Ass'n., 485 US 439 (1988). There were a lot of special contexts.

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In its Establishment Clause doctrine, the Court upheld the values of religious liberty in a few important cases, most notably the school prayer cases of the early 1960s. n71 But the formal Establishment Clause doctrine, the

Lemon test, has an inherent tendency to devalue religious exercise. Each of the prongs plays a part.

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n71 School Dist. of Abington Township v Schempp, 374 US 203 (1963); Engel v Vitale, 370 US 421 (1962).

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The first prong requires a secular purpose for all government action. n72 This requirement is right and proper -- except when purposes that the majoritarian culture considers "secular" happen to be fraught with religious significance to a minority. Then a due regard to the interests of the minority should permit the government at least to take their religious needs into account, even if the accommodation serves no "secular" purpose. Was it really an establishment of religion for the Occupational Safety and Health Administration to modify its hardhat rule out of respect for the religious dress of Sikh construction workers? n73 Was it an establishment to exempt sacramental wine from Prohibition? n74 Did these provisions have any purpose other than the protection of religion? As Justice O'Connor has commented: "It is disingenous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed [*129] burden." n75 To the extent that Lemon's purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance.

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n72 Lemon, 403 US at 612-13.

n73 See OSHA Instruction STD 1-6.3, originally Field Information Memorandum No 75-11 (Feb 4, 1975), revoked, OSHA Notice CPL 2 (Nov 5, 1990).

n74 Volstead Act of Oct 28, 1919, ch 85, Title II, @ 3, 41 Stat 305, codified at 27 USC @ 16 (1988), repealed, Act of Aug 27, 1935, ch 740, Title I, @ 1, 49 Stat 872.

n75 Jaffree, 472 US at 83 (O'Connor concurring).

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The second prong of the Lemon test prohibits government action which has the effect of "advancing religion," even if the effect is unintended and even if the action also advances secular interests. n76 This prohibition tends to foster discrimination against religion in two ways. First, government action often benefits (or "advances") a broad range of activities and institutions, but the effects prong implies that the benefitted class may not include religious activities or institutions. Thus, for example, if the government subsidizes child care services, the effects prong suggests that the government must exclude church-based day care centers or, in the alternative, must require church-based centers to cease religious training and exercises as a condition to receiving the money.

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n76 Lemon, 403 US at 612.

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Second, the effects prong fails to distinguish between advancing religion and advancing religious freedom. Any advancement of religious freedom is an advancement of religion -- but not vice versa. For example, giving government employees the option of taking leave on days of religious observance would "advance" religion. But it would not induce anyone to practice religion; it would only remove an impediment to religious practice and thus expand the freedom of government workers to exercise their faith. n77 On the other hand, requiring public officials to affirm a belief in God "advances" religion by privileging the theist and penalizing the atheist. n78 By failing to distinguish between these two forms of "advancement," the effects prong of the Lemon test interferes with benign government actions to accommodate or facilitate free religious exercise.

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n77 See Ansonia Board of Education v Philbrook, 479 US 60 (1986).

n78 See Torcaso v Watkins, 367 US 488 (1961).

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The third prong of the Lemon test prohibits "excessive entanglement" between government and religion. n79 As with the purpose and effect prongs, there is an element of wisdom in this prohibition. Other things being equal, government involvement with religion almost always has some effect on religion, and the overarching purpose of the Religion Clauses is to minimize the effect of government action on the practice of religion. However, the entanglement [*130] prong overlooks the fact that the practice of religion is frequently intertwined with public life, and consequently that government and religion must interact if religion is even to survive -- let alone participate in civil society on a full and equal basis. Unfortunately, these interactions cannot always proceed on a purely secular plane, since to avoid trampling on religious interests the government must be aware of what they are. In other words, a government that is not to some extent "entangled" with religion is one that is indifferent toward it.

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n79 Lemon, 403 US at 613.

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Moreover, for more than a decade the Court embellished the entanglement prong with the notion of "political divisiveness" -- the theory that the Court must strike down any supposed benefit to religion that generates political controversy even if it is otherwise consistent with the First Amendment. n80 This was a particularly pernicious doctrine, because it armed opponents of religious interest with an invincible weapon: their mere opposition became a basis for a finding of unconstitutionality. Of course, the political

victories of either side in such controversies could be divisive; but the doctrine did not -- and could not -- work both ways. In effect, the doctrine blamed the religious side of any controversy for the controversy. Since the early 1980s, the Court has abandoned the notion of "political divisiveness" as an independent ground for striking down legislation, and properly so. n81

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n80 See id at 622-23; Nyquist, 413 US at 796-97; Aguilar, 473 US at 416-17 (Powell concurring). For a critique of the doctrine, see Edward McGlynn Gaffney, Jr, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St Louis L J 205 (1980).

n81 See Lynch v Donnelly, 465 US 668, 684 (1984) ("[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise impermissible conduct.); Mueller v Allen, 463 US 388, 403-04 n 11 (1983) (restricting political divisiveness doctrine to cases involving a "direct subsidy" to religious institutions). The last case in which political divisiveness played a significant role in the Court's decision was Aguilar v Felton, 473 US 402 (1985), where Justice Powell, who provided the swing vote, concurred on political divisiveness grounds. Id at 416-17.

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The three prongs of the Lemon test, in combination, can frustrate the goals of the First Amendment. Consider Lyng, the case in which Native American worshippers sought to prevent the Forest Service from building a logging road through their ancient places of worship. I have already criticized the Court's unsympathetic application of Free Exercise Clause doctrine in Lyng. n82 Now consider the converse case. Suppose that the Forest Service had done what the Native American plaintiffs asked in Lyng: had allowed their religious needs to trump the secular reasons for building the logging [*131] road. How would this decision have fared under the Lemon test?

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n82 See text accompanying notes 56-61.

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First, consider the purpose of the Forest Service's decision. All the secular criteria for building the logging road were satisfied; the only reason not to build the road would be that the Indians thought the sites to be holy. This manifestly religious reason for the Forest Service's decision would violate the first prong of the Lemon test. n83 Second, consider the primary effect of the Forest Service's decision. Clearly it would advance the religion of the Yuroks, Karoks, and Talowas. The Court itself stated that it would be a "subsidy of the Indian religion" not to destroy the Native Americans' worship sites. n84 That violates the second prong of the Lemon test. Finally, consider whether the Forest Service's decision would entangle government and religion. In order to determine where to build its roads and which portions of the National Forests to open for lumbering, the Forest Service would have to employ religious and anthropological experts to determine the character of purportedly holy sites. In the event of conflicts, the Forest Service would have to decide between conflicting claims of religious significance. n85

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n83 Compare Epperson v Arkansas, 393 US 97, 107 (1968) ("No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens.").

n84 Lyng, 485 US at 453.

n85 Indeed, the government conducted just such an investigation in Lyng -- the investigation that concluded that this particular project would virtually destroy the Indians' religion. Id at 442.

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In short, to accommodate the Native Americans in Lyng would violate all three prongs of the Lemon test. Yet the purposes of the Religion Clauses are advanced, not frustrated, when the government administers its property in such a way as to avoid devastating injury to the religious lives of its people. If Lemon stands in the way, then Lemon is the problem.

It is the parochial school aid cases that most starkly illustrate the perverse effects of the Lemon test. In these cases, the Court generally has prohibited government aid to schools that teach religion. n86 But in Pierce v Society of Sisters, a celebrated decision, the Court held that parents have a constitutional right to send their children to private, including religious, schools. n87 The Court explained that "[t]he fundamental theory of liberty upon which all [*132] governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." n88 Without aid to private schools, however, the only way that parents can escape state "standardization" is by forfeiting their entitlement to a free education for their children -- that is, by paying twice: once for everyone else's schools (through property taxes) and once for their own. By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools. Nondiscriminatory allocation of educational resources would restore religious parents to the neutral set of incentives they faced before the government taxed them to support secular education. Whether nondiscriminatory funding is constitutionally required to achieve the promise of Pierce is a complicated question, not unlike the question whether the constitutional right to abortion recognized in Roe v Wade n89 requires nondiscriminatory funding of abortion and childbirth. n90 But even if nondiscriminatory funding is not constitutionally required, it was one of the greatest inversions of constitutional values in its history for the Court to hold that nondiscriminatory funding is constitutionally forbidden.

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n86 See Lemon, 403 US at 625; Wolman, 433 US at 255; Nyquist, 413 US at 769. Only relatively modest forms of aid of a secular character have been permitted. See Allen, 392 US at 248; Everson, 330 US at 18; Regan, 444 US at 661-62.

n87 268 US 510, 534-35 (1925).

n88 Id at 535.

n89 410 US 113 (1973).

n90 See Michael W. McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv L Rev 989 (1991). The Supreme Court rejected a nondiscriminatory funding claim in a summary decision in Luetkemeyer v Kaufman, 419 US 888 (1974), over a dissent by Justice White and Chief Justice Burger. The question has never been squarely presented in a case on the merits. The principle of nondiscrimination does not necessarily make it unconstitutional for the government to pay for public schools but not to pay for private schools, since the discrimination in that case would be based on the ownership of the schools rather than their ideational content. But it would undoubtedly be unconstitutional for the government to pay for secular private schools and not religious schools, or to maintain a public school system with a monopoly on public funds if the dominant justification for this was to circumvent the requirement of equal treatment.

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In her contribution to this symposium, Professor Sullivan defends the parochial school aid cases on the ground that "[a]ll religions gain from the settlement of the war of all sects against all" as well as from the "provision of universal public education." n91 But nowhere does she explain why giving advantages to secular viewpoints over religious viewpoints is necessary to the achievement of civic peace. n92 The "war of all sects against" is more plausibly [*133] averted by a universal principle of equal treatment, where none is permitted to gain an advantage through the force of government. To permit religious choices only at the cost of forfeiting an equal share in public goods is not freedom of religion. Nor does Sullivan explain how educational choice conflicts with the idea that universal education is a public good, benefitting all. Any education that satisfies objective criteria standards of educational quality generates public as well as private benefits, and should be equally entitled to public support. n93 Religious parents do not seek to be absolved from paying their fair share toward the public good of education; their objection is to being excluded from that good. In any other context, Professor Sullivan would be the first to recognize that it is unconstitutional for the government to refuse to fund an otherwise eligible activity solely because of the content of its speech. n94

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n91 Sullivan, 59 U Chi L Rev at 221 (cited in note 5).

n92 Professor Sullivan does not claim that public schools are, could be, or should be "neutral" toward competing points of view. Id at 200-01.

n93 In this era of Afro-centric and other particularistic multi-cultural schools, it is no longer possible (if it ever was) to argue that religious schools should be excluded because they do not present a unifying common curriculum. See McConnell, 1991 U Chi Legal F 123 (cited in note 33).

n94 See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv L Rev 1413 (1989).

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The parochial school aid decisions of the Warren and Burger Courts can be divided into two categories: those that forbade any assistance to nonpublic schools, and those that allowed assistance only upon conditions that undermined their purpose for being. In Board of Education v Allen, for example, the Supreme Court permitted the state to provide textbooks to parochial school students only if they used the same secular textbooks that the public schools used. n95 This holding effectively required the parochial schools to secularize their curriculum if they wished to receive assistance. The very "standardization" of education held to be unconstitutional in Pierce (when accomplished through the regulatory power) was held to be constitutionally required in Allen (when accomplished through the spending power). Even this conditional grant was too much for the dissenters, who argued that since the schools teach religious doctrine they should not receive any public assistance. n96 Not a single member of the Court suggested that religious freedom and diversity might be enhanced if parents could choose the philosophical orientation of their children's education without forfeiting their fair share of public educational resources.

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n95 Allen, 392 US at 243-45.

n96 Id at 250 (Black dissenting).

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[*134] Despite their differences, the two sides on the Warren and Burger Courts shared a conception that everything touched by government must be secular. One side was deeply suspicious of religion, especially Catholicism, and concluded that quarantine was the only way to stave off theocracy. The other side was willing to accept a certain role for religion in public life, so long as religious institutions sacrificed their distinctively religious character. Whichever side might prevail in a particular case -- the results swung back and forth between the two -- the decisions consistently favored the secular over the religious. The Justices simply did not conceive of a world in which the governmental role was confined to finance, and the content of education left to the free choices of individual families. The Court thus placed the welfare-regulatory state on a collision course with religious freedom. As the sphere of government expanded, the field of religious pluralism had to shrink.

II. THE EMERGING JURISPRUDENCE OF THE REHNQUIST COURT

The Religion Clause jurisprudence of the Warren and Burger era was thus characterized by a hostility or indifference to religion, manifested in a weak application of free exercise doctrine and an aggressive application of an establishment doctrine systematically weighted in favor of the secular and against genuine religious pluralism. Far from protecting religious freedom against the vagaries of democratic politics, the Religion Clauses during this period became an additional instrument for promoting the politically dominant ideology of secular liberalism.

The ideology of secular liberalism, while still strong among the American elite, has lost its position of unquestioned dominance. On the left, a postmodernist intellectual current has cast doubt on the idea that secular liberalism should enjoy a privileged position and has opened the possibility for treating religion as one of many competing conceptions of reality. It is no longer intellectually credible to maintain that secular liberalism is simply the "neutral" position. n97 On the right, the resurgence of conservative religious [*135] movements among both Protestants and Catholics -- and to a lesser extent among Jews -- has made religion a more salient force in the political culture. If taken to extremes, this religious resurgence might well support measures inconsistent with the pluralist religious ideals of the First Amendment. Calls for a "Christian America" and the return of organized prayers in the schools give genuine -- if often exaggerated -- cause for alarm. But appropriately channelled, this shift in popular attitudes could provide a corrective for the secularist biases of the previous judicial era.

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n97 A major theme of feminist legal studies, critical legal studies, critical race studies, and other postmodernist jurisprudence is that the seemingly objective cultural norms of liberalism privilege a particular (white, male, capitalist, rationalistic, heterosexual, Eurocentric) point of view and should be replaced by a radically pluralistic, multi-cultural approach. See, for example, Stephen Gardbaum, Why the Liberal State Can Promote Moral Ideals After All, 104 Harv L Rev 1350, 1350-53 (1991); Mari Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L J 1330, 1392-1407 (1991); Martha Minow, The Supreme Court 1986 Term -- Foreword: Justice Engendered, 101 Harv L Rev 10, 11-12 (1987). One would think that this jurisprudence would be receptive to arguments for religious pluralism, on the ground that the old jurisprudence privileges a secular worldview in the guise of "neutrality" and suppresses the various religious alternatives. For the most part, however, postmodernist legal scholarship has either ignored religion or treated it with hostility, as if it were part of the hegemonic culture to be overthrown. See Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 Cal L Rev 1011, 1015 (1989) (criticizing "the hostility toward and ignorance of theology . . . in feminist theory"). Notwithstanding the general failure of postmodernists to apply their critique to issues of religion, however, their attack on liberal neutrality has fatally wounded the Religion Clause jurisprudence of the Warren and Burger Courts as an intellectual position.

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It is too early to tell how the Rehnquist Court ultimately will treat the Religion Clauses. The new Court seems prepared to repudiate the approach of the old, and in important areas -- discussed in detail in Section III -- has ameliorated unfortunate features of Warren and Burger Court Establishment Clause doctrine. But these improvements on establishment issues have come at a heavy price: the radical reduction of free exercise rights. Moreover, even where the results seem correct, the Rehnquist Court has failed to articulate a coherent vision of what it is attempting to accomplish. The positive developments, without exception, have involved the Court's decision not to overturn actions taken by the political branches. Thus, it is possible that the Court has mistaken the real vices of the old jurisprudence as ones of excessive judicial activism rather than of favoring the secular over the religious.

One of the anomalies of the Warren and Burger approach was its expansive reading of both the Free Exercise and Establishment Clauses (though in the case of free exercise this expansive reading was largely an illusion). If the government attempted to regulate a religious activity, it might be held to violate the Free Exercise Clause; if it carved out a religious exemption, this might be held an establishment. The government seemed destined to lose, no matter what policy it adopted toward religion. There was, accordingly, some legitimacy to then-Associate Justice Rehnquist's complaint that "[b]y broadly construing both Clauses, the Court has constantly [*136] narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." n98

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n98 Thomas v Review Board, 450 US 707, 721 (1981) (Rehnquist dissenting).

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The initial response of the Rehnquist Court has been to shrink the scope of both Religion Clauses and thereby to restore a significant degree of governmental discretion. This response can be seen as part of a general jurisprudential shift in favor of greater judicial restraint, which in other constitutional areas may be a welcome corrective. But judicial restraint, for its own sake, is not a faithful mode of interpreting the Religion Clauses. There is a crucial difference between the discovery of "rights" not expressly or implicitly protected by the Constitution, where the dangers of judicial legislation and the need for judicial restraint are greatest, and the enforcement of rights firmly based on the text and tradition of the Constitution.

The original theory of the First Amendment was not deferential to government in matters of religion. Daniel Carroll, one of two non-Protestant members of the First Congress, captured the spirit during the deliberations over what would become the Religion Clauses of the First Amendment. "The rights of conscience," he said, "will little bear the gentlest touch of governmental hand." n99 The Religion Clauses were born of distrust of government in matters of religion, based on experience. Those groups most vocal in demanding protection for religious freedom -- the Quakers, the Presbyterians, and above all the Baptists -- were precisely those groups whose practices were out of keeping with the majoritarian culture and who had borne the brunt of governmental hostility and indifference. n100 It is a mistake to read the Religion Clauses as a triumph for the forces of Enlightenment secularism. Proponents of religious freedom were the least secular and most "enthusiastic" of the sects. But it is equally mistaken to treat the Religion Clauses as acquiescing in governmental interference with religion. The advocates of the Religion Clauses valued their religious convictions too much to allow them to be subjected to governmental power. The overriding objective of the Religion Clauses was to render the new federal government irrelevant to the religious lives of the people.

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n99 Speech of Daniel Carroll (Aug 15, 1789), in Gales, ed, 1 Annals of Congress at 757-58 (cited in note 6).

n100 Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv L Rev 1409, 1437-41 (1990).

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[*137] This objective has been vastly complicated by the emergence of the welfare-regulatory state. During the early days of the Republic, the reach of the federal government was strictly limited, and the matters within its jurisdiction -- chiefly foreign and military affairs and commerce -- had little effect on religion. Recall that Madison and the other Federalists initially argued that a Bill of Rights was not necessary because the powers of the federal government were so limited that it could pose no danger to our liberties. n101 With some exceptions, if the federal government simply took no actions directed at religion, the objectives of the Religion Clauses would be fulfilled. n102 As the powers of the federal government expanded and the coverage of the First Amendment was extended to the states, however, this ceased to be true. The government now fosters a vast sector of publicly-supported, privately-administered social welfare programs, and the allocation of resources in this sector inevitably affects religion. The government also now regulates the non-profit sphere, and these regulations similarly affect religion. Where once the government could treat religious institutions with benign neglect, the welfare-regulatory state requires a substantive policy toward religion that will preserve the conditions of religious freedom without hobbling the activist state. Unfortunately, neither the free exercise nor the establishment jurisprudence that seems to be emerging in the Rehnquist Court addresses that central problem.

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n101 Max Farrand, 2 The Record of the Federal Convention of 1787 587-88 (Yale, rev ed 1937).

n102 For examples of how the enumerated powers of Congress could affect religion, see McConnell, 103 Harv L Rev at 1478 nn 342-52 (cited in note 100).

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A. Free Exercise

The Rehnquist Court's tendency to defer to majoritarian decisionmaking is most clearly evident in its reversal of free exercise doctrine. As noted above, the Warren and Burger Courts held governmental action invalid when it imposed a burden on the exercise of a sincerely held religious belief without compelling justification. n103 This meant that the government sometimes had to make accommodations or exceptions to laws that burdened the exercise of religion. In 1990, in Employment Division v Smith, the Rehnquist Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or [*138] prescribes) conduct that his religion prescribes (or proscribes).'" n104 If the law is "generally applicable," the government need not show that it serves an important (let alone compelling) purpose, even if its effect -- as in Smith itself -- is to make the practice of a religion virtually impossible. n105 Thus Smith holds that the state may forbid the central religious practice of a centuries-old religion now called the Native American Church -- the sacramental ingestion of peyote -- even though there was no

evidence that this practice had deleterious consequences for the practitioners or for anyone else. n106

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n103 See text accompanying notes 67-70.

n104 Smith, 110 S Ct at 1600 (quoting United States v Lee, 475 US at 263 n 3).

n105 Id at 1599.

n106 Id at 1597-98, 1606.

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I have criticized the Smith decision elsewhere at length, n107 and I will not repeat those arguments. Nonetheless, a few observations on Smith will illustrate why I am concerned that the Rehnquist Court may be as mistaken in its way as were the Warren and Burger Courts. First and foremost, the Smith decision gives social policy, determined by the State, primacy over the rights of religious communities to order their affairs according to their own convictions. Smith describes this effect as an "unavoidable consequence of democratic government." n108 Is apprehension of illegal aliens a policy of the government? Then the government can dragoon the Quaker Church, which for centuries, has welcomed strangers and aliens in compliance with its reading of biblical principles, into enforcing the law against immigration. n109 Does the government favor preservation of old buildings in their original configuration? Then the government can determine how churches design their houses of worship. n110 Does the government believe that homosexuality is a legitimate lifestyle? Then the government can require a religious university, which preaches that homosexual acts are sinful, to play host to gay rights organizations on its campus and to support them with its student funds. n111 Under Smith, the state is more powerful, the forces of homogenization are more powerful, and the ability of [*139] churches to maintain their distinctive ways of life depends upon their skill at self-protection in the halls of Congress.

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n107 Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U Chi L Rev 1109 (1990).

n108 Smith, 110 S Ct at 1606.

n109 American Friends Service Committee v Thornburgh, 941 F2d 808, 809-10 (9th Cir 1991).

n110 See Angela C. Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, 36 Villanova L Rev 401 (1991).

n111 Gay Rights Coalition v Georgetown Univ., 536 A2d 1 (DC App 1987) (en banc); see Comment, Georgetown Rights Coalition v. Georgetown University: Failure to Recognize a Catholic University's Religious Liberty, 32 Cath Lawyer 170 (1988).